DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-1272
Title: Kentucky, Petitioner
v.
Hollis Deshaun King
Docketed: April 21, 2010
Lower Ct: Supreme Court of Kentucky
Case Nos.: (2008-SC-000274-DG)
Decision Date: January 21, 2010
Questions Presented

---Date---	--------Proceedings and Orders----------
Apr 19 2010	Petition for a writ of certiorari filed. (Response due May 21, 2010)
May 17 2010	Waiver of right of respondent Hollis Deshaun King to respond filed.
May 21 2010	Brief amici curiae of Indiana, et al. filed.
Jun 1 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 15 2010	Response Requested. (Due July 15, 2010)
Jul 7 2010	Order extending time to file response to petition to and including September 13, 2010.
Aug 24 2010	Brief of respondent Hollis Deshaun King in opposition filed.
Aug 24 2010	Motion for leave to proceed in forma pauperis filed by respondent.
Sep 7 2010	Reply of petitioner Kentucky filed. (Distributed)
Sep 8 2010	DISTRIBUTED for Conference of September 27, 2010.
Sep 28 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Sep 28 2010	Petition GRANTED limited to Question 1 presented by the petition.
Oct 15 2010	Letter from counsel for the respondent received. (Distributed)
Oct 26 2010	Letter and attachment received from counsel for the respondent (Distributed).
Oct 28 2010	Motion to dismiss the writ of certiorari as improvidently granted filed by respondent Hollis Deshaun King.
Nov 1 2010	Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
Nov 5 2010	Response to motion to dismiss as improvidently granted filed.
Nov 8 2010	DISTRIBUTED for Conference of November 12, 2010.
Nov 8 2010	SET FOR ARGUMENT ON Wednesday, January 12, 2011.
Nov 12 2010	Brief of petitioner Kentucky filed.
Nov 12 2010	Joint appendix filed. (Statement of costs received)
Nov 15 2010	Motion to dismiss the writ of certiorari as improvidently granted DENIED.
Nov 19 2010	Brief amicus curiae of the United States filed.
Nov 19 2010	Brief amici curiae of Indiana, et al. filed.
Nov 26 2010	CIRCULATED.
Dec 9 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 13 2010	Brief of respondent Hollis Deshaun King filed. (Distributed)
Dec 13 2010	Record received from Circuit Court of Fayette County, Kentucky. (1 box)
Dec 14 2010	Record received from the Supreme Court of Kentucky. (1 box.)
Jan 5 2011	Reply of petitioner Kentucky filed. (Distributed)
Jan 7 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 12 2011	Argued. For petitioner: Joshua D. Farley, Assistant Attorney General, Frankfort, Ky.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Jamesa J. Drake, Assistant Public Advocate, Frankfort, Ky.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 10-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers entered an apartment building in hot pursuit of a person who sold crack cocaine to an undercover informant. They heard a door slam, but were not certain which of two apartments the trafficker fled into. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the trafficker had fled into that apartment. The officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that (1) the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door, and (2) the hot pursuit exception to the warrant requirement did not apply because the suspect was not aware he was being pursued. The two questions presented are:

1. When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

2. Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

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3. Opinion of the Kentucky Supreme Court 34a

PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of *certiorari* to review the judgment of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The Supreme Court of Kentucky's opinion is reported as *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010). Petitioner's Appendix ("App.") 34a-50a. The Court of Appeals' decision is unreported, however it can be found at *King v. Commonwealth*, 2008 WL 697629 (Ky.App. 2008); App. 12a-33a. The Fayette Circuit Court Finding of Fact and Conclusions of Law from the suppression hearing can be found in Petitioner's Appendix. App. 1a-11a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky entered the judgment from which relief is sought on January 21, 2010. App. 34a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts

On October 15, 2005, the Lexington Police conducted an undercover "buy-bust" operation, in which undercover informants purchased narcotics from felony drug traffickers. During this operation one such felon, after selling the undercover informant crack cocaine, began moving at a fast pace back to his apartment.

An undercover officer radioed to waiting patrol cars that the felon was fleeing from the scene at a fast pace and that they should quickly move in and apprehend him. Uniformed officers, waiting nearby, immediately exited their cruisers and quickly proceeded to the apartment building breeze-way that the fleeing felon had entered.

Upon entering the breeze-way, the officers heard a door slam at the far end of the hall. There were only two doors into which the felon could have fled. The officers encountered the scent of burning marijuana, which became stronger as they approached the apartment doorway on the left of the hallway. Due to the strength of the odor at the door's threshold, the officers reasoned that the left rear door was the door that had recently been slammed. The officers reasoned that the opening of the left rear door which allowed the fleeing felon entry, also allowed the scent of burning marijuana to escape the apartment. The officers therefore believed that the fleeing felon had entered the apartment door on the left.

However, out of an abundance of caution, not knowing specifically which door the felon entered, the police officers knocked loudly on the left door and announced themselves three times.

After no response, the officers heard things inside the apartment being moved around. Based upon their training and experience, the officers recognized the sounds coming from the apartment to be consistent with the sounds of destruction of physical evidence. Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police officers entered the apartment.

In an attempt to locate the fleeing suspect, the officers immediately conducted a protective sweep of the apartment. However, the suspect could not be located. After completing the protective sweep, the officers noticed in plain view several large quantities of both marijuana and cocaine. At this point the officers placed the occupants of the apartment under arrest. Respondent was one of the occupants in the apartment who was arrested.

B. Procedural History

1. Fayette Circuit Court

A Fayette County Grand Jury indicted Respondent on November 21, 2005, and charged him with first-degree trafficking in a controlled substance, trafficking in marijuana, and being a second-degree persistent felony offender. Respondent moved to suppress the evidence discovered after the warrantless entry. After a suppression hearing, the Fayette Circuit Court denied respondent's motion to suppress.

The circuit court held that the smell of burning marijuana coming from the apartment door provided the probable cause for the officers to continue their investigation. The court went on to state that the investigation was properly conducted by initially knocking on the door, announcing police presence, and awaiting a response or consensual entry. The circuit court held that no response from the apartment, coupled with noises indicative of destruction of evidence, particularly narcotics due to the smell, constituted exigent circumstances justifying warrantless entry into the apartment. App. 9-10a.

Respondent entered a conditional guilty plea, reserving his right to appeal the circuit court's denial of his motion to suppress. Respondent pled guilty to trafficking in a controlled substance; possession of marijuana; and persistent felony offender in the second degree. Respondent received an eleven-year sentence.

2. Kentucky Court of Appeals

Respondent appealed the circuit court's denial of his suppression motion to the Kentucky Court of Appeals. On March 14, 2008, the Kentucky Court of Appeals affirmed the circuit court's denial of his motion to suppress. App. 12a.

The Kentucky Court of Appeals held that the exigent circumstances exception to the warrant requirement was not applicable, because the police had created the exigency by knocking on the apartment door. Nonetheless, the Court of Appeals held that the entry was valid under the "good faith" exception since the officers did not take any deliberate action to evade the warrant requirement. App. 21-24a. The Court of Appeals did not specifically address the hot pursuit exception, but noted that it could not "be concluded as a matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence." App. 21a. The Court of Appeals stated,

> Therefore, because the police were pursuing a suspected felony crack cocaine dealer following a "buy-bust" operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime, we conclude that the warrantless entry into King's apartment was valid.

App. 24a.

3. Kentucky Supreme Court

Respondent sought discretionary review of the Kentucky Court of Appeals' decision to the Kentucky Supreme Court, which was granted. On January 21, 2010, the Kentucky Supreme Court, issued a published decision reversing and remanding the case to the trial court, overruling the circuit court's denial of the motion to suppress evidence found after warrantless entry. App. 34a.

The Kentucky Supreme Court ruled that neither the hot pursuit nor exigent circumstances exception was applicable.

As to hot pursuit, the Kentucky Supreme Court stated that the exception did not apply because the suspect was unaware that the police were pursuing him. App. 40-41a. The court reasoned that "[a]n important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued." App. 40a. (citation omitted). Based upon this reasoning the court held that since there was no direct evidence that the suspected drug trafficker knew that the police were in pursuit of him, the police were not in hot pursuit. App. 41a.

As to exigent circumstances, the Kentucky Supreme Court held that by knocking on the door and announcing their presence the police officers created the resulting exigency of destruction of evidence, and, therefore, the police could not rely on this exigency to effect warrantless entry. App. 47a.

In reaching this conclusion, the Kentucky Supreme Court acknowledged that, in some sense, exigent circumstances justifying warrantless entry are always

created by the police. App. 44a. The court concluded, nonetheless, that in certain circumstances police may not create the exigent circumstances that would otherwise justify a warrantless entry. App. 43a.

The Kentucky Supreme Court recognized that the federal circuits and states have adopted differing tests for determining when police impermissibly create the exigent circumstances relied upon for warrantless entry. After discussing the differences in the tests for the Second, Third, Fifth, Sixth, and Eighth Circuits, and the Arkansas Supreme Court, the Kentucky Supreme Court crafted their own test. App. 44a-46a.

The court grafted one part of the Fifth Circuit's test for police-created exigencies with one part from the Arkansas Supreme Court's test, to create a hybrid two-part test for Kentucky.

> First, courts must determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." [*United States v.*] *Gould*, 364 F.3d 578, 590 [(5th Cir. 2004)]. If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann* [*v. State*, 161 S.W.3d 826] at 834 [(Ark. 2004).]. If so, then the exigent circumstances cannot justify the warrantless entry.

App. 45a-46a.

The Kentucky Supreme Court applied this new test to the facts of Respondent's case and determined that the officers did not act deliberately with the bad faith intent to avoid the warrant requirement. However, under the second part of its new test the court determined that the resulting exigent circumstances, the destruction of physical evidence, was a reasonably foreseeable result of knocking on a door and announcing police presence after having smelled burning marijuana emanating from the apartment door. App. 46a-47a.[1]

REASONS FOR GRANTING THE WRIT

The Kentucky Supreme Court's ruling in this case exacerbates the division among the lower courts on two fundamental Fourth Amendment issues and further complicates proper police investigation. This ruling unduly limits proper police conduct by holding that police can impermissibly create exigent circumstances by knocking on a person's door and that police must prove that a fleeing suspect knew of their activity before they will be considered to have been in hot pursuit. Currently a deep split exists among the circuits regarding the proper test to determine when police impermissibly create exigent circumstances and the Kentucky Supreme Court's hot pursuit determination is opposite reasonably

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[1]The Kentucky Supreme Court's decision in Respondent's case, also overruled the Kentucky Court of Appeals decision in his co-defendant's case. See *Washington v Commonwealth*, 231 S W 3d 762 (Ky.App 2007)

objective Fourth Amendment determinations. Given the abiding and increasing uncertainty in these areas of law, and because these issues are likely to reoccur in significant numbers, this Court should grant *certiorari* to review the lower court's decision and clarify the proper tests to be employed.

I. This Court Should Grant Certiorari to Resolve the Conflict Over Whether, and When, the Exigent Circumstances Exception to the Warrant Requirement Applies When Police "Create" the Exigency.

This Court has carved out exceptions to the Fourth Amendment's warrant requirement,[2] but has never determined whether police can create the exigent circumstances then used to justify a warrantless entry under those exceptions. As a consequence, the lower courts have been debating the issue for over forty years, resulting in a dramatic split among the circuits and an improper narrowing of the exceptions.

All of the circuits find that in certain circumstances the exigent circumstances exception does not apply when police create the exigency. However, their tests for determining when this occurs are as varied as the circuits themselves.

The Kentucky Supreme Court acknowledged this

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[2]See *Welsh v Wisconsin*, 466 U S 740 (1984), *Payton v New York*, 445 U S 573 (1980), *Michigan v Tyler*, 436 U S 499 (1978), *United States v Santana*, 427 U S 38 (1976), *Warden v Hayden*, 387 U S 294 (1967), *Schmerber v California*, 384 U S 757 (1966)

division among the circuits, as have published dissenting opinions from the Third and Second Circuits. App. 44a-45a; *United States v. Coles*, 437 F.3d 361, 371-373 (3rd Cir. 2006);*United States v. MacDonald*, 916 F.2d 766, 773-777 (2nd Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991). See also Bryan M. Abramoske, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U.L. Rev. 561 (2008) (discussing the circuit split). These varied tests are outcome-dispositive. Had this case been litigated in the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, or D.C. Circuits, the Commonwealth would have prevailed.

Circuits and state high courts have been addressing this issue since 1968, yet even as recently as 2008 have been creating new tests and muddying the waters of review. See *Niro v. United States*, 388 F.2d 535, 54[illegible] (1st Cir. 1968); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008). The issue has sufficiently percolated among the lower courts, but to no avail. The divide among the circuits is further widening, and no uniform national rule will exist until this Court takes action.

This Court's intervention is all the more necessary because of the dangerous consequences of the test applied by several circuits and the Kentucky Supreme Court. In these jurisdictions, police are barred entry even when they act in good faith and are trying to prevent the destruction of evidence or physical harm. Such a rule necessarily rewards the illegal behavior of the home's occupants in their reaction to police presence. It would be a dangerous rule, in the absence of illegal police action, to hold that police can impermissibly

create the exigent circumstances that allow for their warrantless entry, thus prohibiting entry in times of dire need. This Court should not allow for a rule that creates a benefit for a home's occupants to destroy evidence, flee, or draw their weapons based upon an otherwise legal knock upon their door by police.

A. The Circuits and State High Courts Are Deeply Divided on the Issue.

There are currently five different tests being used by the United States Courts of Appeals to determine whether the police have impermissibly created the exigent circumstances relied upon for warrantless entry. This has resulted in an inconsistent application of Fourth Amendment protections and the exceptions applicable to those protections. The five different tests adopted and relied upon by the circuits are dramatic in their differences. These tests range from asking only whether the police acted lawfully to a results-oriented question of foreseeability. This division is easily seen when the separate tests and circuits are compared.

1. The First and Seventh Circuits: Unreasonable Delay in Obtaining a Warrant

The First and Seventh Circuits have adopted a test for determining when police impermissibly create exigent circumstances that looks at whether the police officers unreasonably or purposefully delayed obtaining a warrant. See *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988). In *Rengifo* the court declared that it refused to find exigent circumstances where the

"circumstances [were] created by government officials who unreasonably and deliberately delay[ed] or avoid[ed] obtaining the warrant." *Id.*, at 804. See also *United States v. Samboy*, 433 F.3d 154 (1st Cir, 2005) *cert. denied*, 547 U.S. 1118 (2006) (following *Rengifo*); *Niro v. United States*, 388 F.2d 535, 540 (1st Cir. 1968) ("Government agents cannot 'delay' or 'avoid' obtaining a warrant . . .").

Similarly, the Seventh Circuit in *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980) abrogated on other grounds by *Dowling v. United States*, 473 U.S. 207 (1985), upheld a search because "[it] [did] not believe the exigency arose from the deliberate or unreasonable delay on the part of the agents. The record amply demonstrates the agents did not purposely wait for 'exigent circumstances' to arise to avoid the necessity of obtaining a warrant."). Accord *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986); *United States v. Dowell*, 724 F.2d 599, 602 (7th Cir.1984) ("Moreover, this court maintains that law enforcement officials may not deliberately wait for exigent circumstances to arise and then exploit the exception to justify warrantless entry.").[3]

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[3]See also *United States v. Beltran*, 917 F.2d 641, 643 (1st Cir. 1990) ("where police fully expect that they may have to enter a home and when they have enough time and knowledge to secure a warrant, they must do so"), *United States v. Curzi*, 867 F.2d 36, 43 (1st Cir 1989)(police had two hours in which to obtain warrant and failure to do so prevented finding of exigent circumstances), accord, *Niro v. United States*, 388 F.2d 535, 540 (1st Cir 1968) (authorities cannot claim exigency "if the need for it has been brought about by deliberate and unreasonable delay").

2. The Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits: Unreasonable Delay in Obtaining a Warrant Coupled with Deliberate Conduct in an Attempt to Evade the Warrant Requirement

The Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits also use a test that asks whether there has been an unreasonable or purposeful delay in obtaining a warrant. These circuits, however, will not find that police have impermissibly created the resulting exigent circumstances without a finding of "deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement." *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002) quoting *United States v. Campbell*, 261 F.3d 628, 633-34 (6th Cir. 2001).

Thus, for example, the Tenth Circuit held that the police officers' approach to a motel room in which they believed narcotics activities were occurring did not create exigent circumstances even if the exigency - destruction of evidence - was not unexpected. *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991). In the D.C. Circuit's words, "[a]s long as police measures are not deliberately designed to invent exigent circumstances, we will not second-guess their effectiveness." *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 858 (1988); see also *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir.1995) ("This is not a case where the government purposely tried to circumvent the requirements of [the knock and announce statute]."); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc), *cert. denied*,

502 U.S. 907 (1991).[4]

3. The Third and Fifth Circuits: Bad Faith and Unreasonable Police Action

The Fifth Circuit has developed its own two-part test, which the Third Circuit later adopted. The first part of the Fifth Circuit's two-part test asks whether police deliberately created the exigent circumstances with the bad faith intent of evading the warrant requirement. The court must then determine whether, "even if they did not do so [create the exigent circumstances] in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement." *United States. v. Gould,* 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004).

This circuit precludes police from justifying warrantless entry based on the existence of intentionally created exigencies and generally requires that exigent circumstances exist prior to when police knock and

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[4]See also *United States v Chambers*, 395 F 3d 563, 569 (6th Cir 2005); *United States v Ojeda*, 276 F 3d 486 (9th Cir 2002), *United States v Calhoun*, 542 F 2d 1094, 1102-03 (9th Cir 1976), *cert denied*, 429 U.S 1064 (1977), *United States v Curran*, 498 F 2d 30, 34 (9th Cir 1974), *United States v Castro*, 225 F App'x 755, 758 (10th Cir 2007) (unpublished opinion), citing *United States v Bonitz*, 826 F 2d 954, 957 (10th Cir.1987) (exigent circumstances did not justify a warrantless search based on a claim that entry was required to ensure the officers' safety), *United States v Flowers*, 336 F 3d 1222, 1230 (10th Cir 2003), *United States v Scroger*, 98 F 3d 1256, 1259 (10th Cir 1996) *cert denied*, 520 U S 1149 (1997), *United States v Aquino*, 836 F 2d 1268, 1270 (10th Cir 1988)

announce themselves at the door. *United States v. Richard*, 994 F.2d 244, 248-250 (5th Cir. 1993)(exigent circumstances do not withstand Fourth Amendment analysis when deliberately created). The Fifth Circuit focuses on the reasonableness and propriety of the officers' actions and investigative tactics leading up to a warrantless entry and will invalidate a warrantless entry if the officers' actions are considered unreasonable. See *Gould* at 590; *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) *cert. denied*, 534 U.S. 861 (2001); *United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995) *cert. denied*, 516 U.S. 883 (1995); *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986). The Third Circuit recognized that the Second Circuit had adopted a test that is "hard to reconcile" with the Fifth Circuit's test, and that the two tests reflect "different inquiries." *United States v. Coles*, 437 F.3d 361, 369 (3rd Cir. 2006) (The Second Circuit's test is discussed in subsection I(A)(5), *infra*.). The court concluded that the Fifth Circuit's approach, which focused the Fourth Amendment inquiry on the reasonableness and propriety of the police actions preceding the warrantless entry was superior. *Id.*, at 367-370. The Third Circuit then adopted the Fifth Circuit's test in *Coles*. However, in adopting the Fifth Circuit's test, the Third Circuit combined the separate parts of the test. The Third Circuit looks to the reasonableness of the officers' investigative tactics that triggered the exigency to determine whether the police impermissibly manufactured the exigency through bad faith. *Id.*, at 370-372. Mere delay absent bad faith, when coupled with unreasonable police action, will be sufficient to give

rise to impermissibly created exigencies in the Third Circuit.

4. The Fourth and Eighth Circuits: Foreseeability of Results of Police Action Resulting in Exigent Circumstances

The Fourth and Eighth Circuits set forth yet another unique test for police-created exigencies. In *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008), the Fourth Circuit relied heavily on this Court's decision in *Johnson v. United States*, 333 U.S. 10 (1948), in holding that the officers created the exigent circumstances themselves - and therefore the exception did not apply - because the exigent results of the police officers' actions were reasonably foreseeable. See also *United States v. Collazo*, 732 F.2d 1200, 1204 (4th Cir.1984) *cert. denied sub nom.*, 469 U.S. 1105 (1985).

The Eighth Circuit adopted this test in *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir.1990) *cert. denied*, 516 U.S. 852 (1995), ruling that the police impermissibly created the exigency at issue because the exigency was a reasonably foreseeable result of the officers' actions.

The Third, Fourth, Fifth, and Eighth Circuits' tests rely upon this Court's decision in *Johnson v. United States*, 333 U.S. 10 (1948). However, these circuits' reliance upon this Court's holding in *Johnson* is misplaced. This Court held in *Johnson* that the government had not established an exigency, not as these circuits rely, that the police officers impermissibly created the exigent circumstances that they relied upon

for entry. *Id.*, at 14-15. Johnson was decided in 1948, prior to this Court's decisions specifically setting forth the exigent circumstances exceptions.[5]

In *Johnson*, no exigency existed. There was no attempted flight or destruction of evidence, rather police simply arrested the defendant in an attempt to locate contraband. Police-created exigency cases should not be analyzed under the same lens as that applied in *Johnson*. Rather, in these cases, an exigency actually exists. *Johnson* would be applicable if the defendant (as occurred in the case at hand) had attempted to destroy evidence when the police knocked on her door, triggering warrantless entry. However, in *Johnson* the defendant calmly answered her door, with no contraband in plain sight. *Id.*, at 12.

5. The Second Circuit: Lawful Manner

The Second Circuit has adopted a rule that simply asks whether police acted in a lawful manner, without regard to the officers' subjective intentions. *United States v. MacDonald*, 916 F.2d 766, 772 (2nd Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991) ("when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances."). See also *United States v. Lopez*, 937 F.2d 716, 723-24 (2nd Cir. 1991) *cert. denied*, 525 U.S.

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[5]See *Welsh v Wisconsin*, 466 U S 740 (1984), *Payton v New York*, 445 U.S 573 (1980), *Michigan v Tyler*, 436 U S 499 (1978), *United States v Santana*, 427 U S 38 (1976), *Warden v Hayden*, 387 U S 294 (1967), *Schmerber v California*, 384 U S. 757 (1966)

974 (1998) (following *MacDonald*).

In *MacDonald*, as here, there was an undercover narcotics sale. The officer in *MacDonald* returned, with other officers, to the apartment where he made the purchase. After knocking and announcing themselves, the officers heard sounds of shuffling feet and received a radio call from agents outside the building that occupants of the apartment were trying to escape. The officers forcibly entered the apartment, arrested several men and discovered large quantities of narcotics. 916 F.2d at 768. The Second Circuit upheld the warrantless entry, rejecting the contention that the entry was invalid because the officers created the exigency. The court explained that,

> Exigent circumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity. The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so. Thus, assuming *arguendo* that there were no exigent circumstances before the knock, the agents' conduct did not impermissibly create the circumstances occurring thereafter.

Id., at 771.

In *MacDonald* the Second Circuit distinguished a prior holding by stating that *United States v. Segura*, 663 F.2d 411 (2nd Cir.1981), aff'd on other grounds, 468 U.S. 796 (1984) was decided based upon the principle

articulated in *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir.1980), that law enforcement agents may not create their own exigencies "through illegal conduct." *MacDonald* at 772. The court concluded by "hold[ing] that when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances. Law enforcement agents are required to be innocent but not naive." *Ibid.*

6. State High Courts are Also Irreconcilably Split

State court decisions across the nation also show a dramatic divide in the tests that they use to determine whether police impermissibly created exigent circumstances. States have both adopted the many circuit tests as well as created their own hybrid tests, such as the Kentucky Supreme Court did in this case.

For example, in *State v. Santana*, 568 A.2d 77 (N.H. 1991), the New Hampshire Supreme Court created a new test, combining the First and Fourth Circuits' tests, which examines the totality of the circumstances, in particular delay in obtaining a warrant and the foreseeability of the results of police actions. The Pennsylvania Supreme Court adopted a similar test in *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996). By contrast, in *People v. Aarness*, 150 P.3d 1271 (Colo. 2006), the Colorado Supreme Court set forth a test similar to the Second Circuit's test. The court stated in *Aarness* that it was not police action that created the exigent circumstances, but rather it was the suspects'

reactions that created them. *Id.*, at 1280.[6]

This variance continues to deepen the divide among the lower courts' application of Fourth Amendment protections.

7. The Varying Tests Employed by the Circuits and State High Courts Lead to Directly Contrary Results

These varying tests have created a situation in which directly contrary results are obtained in each court given identical facts. Depending on which circuit or state this case was litigated in, different results would be reached.

Under the test employed by the First and Seventh Circuits, the Commonwealth would have prevailed in this case because there was no unreasonable or purposeful delay in obtaining a search warrant. See *Rengifo* and *Berkwitt*, *supra*. Under the

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[6]See also *People v Daughhetee*, 211 Cal Rptr 633 (Cal.App 1985)(setting forth a California rule that relies on an unreasonable delay in obtaining a warrant combined with an intentional effort on the part of police to create the exigent circumstances, similar to the Sixth Circuit's test), *People v Wilson*, 408 N E 2d 988 (Ill App 1980)(adopting a test similar to the Eighth Circuit's foreseeability test, with the inclusion of a determination concerning the reasonableness of police action and delay in obtaining a warrant), *Commonwealth v Cataldo*, 868 N.E.2d 936 (Mass.App Ct 2007)(citing to other Massachutes cases setting forth a rule similar to the First Circuit's, based upon unreasonable delay in obtaining a warrant), *State v Stanton*, 627 A 2d 674 (N J Super 1993)(adopting a test similar to that of the Second Circuit, examining reasonable police investigative tactics, however the court recognized that lawful tactics were necessarily reasonable), *State v Bender*, 724 N W.2d 704 (Wis App 2006)(unpublished decision)(noting a circuit split and relying on a test similar to those of the Fifth and Third Circuits)

circumstances of the case at hand, police officers were in hot pursuit of a fleeing drug trafficker, who had just moments before completed an illegal transaction. The police believed that the suspect knew of their presence and was evading them to destroy evidence of his crimes. Therefore no time existed in which a search warrant could have been obtained, and so no unreasonable or purposeful delay existed.

The Commonwealth would have also prevailed under the test used by the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits. In addition to asking whether there was unreasonable delay in obtaining a search warrant, these circuits look for deliberate conduct in an effort to purposefully evade the warrant requirement. See *Ewolski*; *VonWillie*; *Carr*; and *Tobin*, *supra*. Here, police did not take any deliberate action in an effort to purposefully evade the warrant requirement. The officers had no time to obtain a warrant under the given circumstances.

The Commonwealth would have prevailed under the Second Circuit's test. There was no illegal action on the part of police officers during their encounter with the Respondent. The police, therefore, did not impermissibly create the exigency of destruction of physical evidence, and their warrantless entry was proper. See *MacDonald*, *supra*. The police were in a public place (an open apartment breeze-way) and lawfully knocked on the Respondent's door, just as any other member of the public could have done.

In contrast, the Respondent would have prevailed in the Fourth and Eighth Circuits. The test in these circuits looks to the foreseeability of police actions, just as the Kentucky Supreme Court did here. See *Mowatt*,

supra; *Duchi*, *supra*; App. 46a.

Under the test used by the Third and Fifth Circuits, the Respondent would have also prevailed. Under this test the court would have to determine whether the police acted in bad faith in knocking on the Respondent's door. See *Richard*, *supra*. The court would have to determine, based on the subjective intentions of the police officers, whether or not they purposefully knocked on the Respondent's door in an effort to create the exigent circumstances that allowed their entry. Under the reasonableness inquiry police officers actions in approaching a suspect's residence to conduct a knock and talk and further their investigation will be determined to be unreasonable unless the police had no notice of any illegal activity prior to approaching the residence. See *Jones*, 293 F.3d 716 at 721-722 and *Munoz-Guerra*, 788 F.2d 295 at 298. Even if the officers' actions were found to be in "good faith" under the first prong of the Fifth Circuits' test, their action of knocking on the Respondent's door, after having smelled burning marijuana, would be found unreasonable under the second prong of the Fifth Circuit's test and the Third Circuit's test.

In sum, when applying the facts of the case at hand to the differing tests used by each of the circuits it can be determined that the Commonwealth would have prevailed in eight circuits (the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits) and the Respondent would have prevailed in four circuits

(the Third, Fourth, Fifth, and Eight Circuits).[7] Further, the results in each of these circuits would be reached for very different reasons. The patchwork of tests used by the varying circuits and state high courts, resulting in directly contradictory outcomes governing the application of the Fourth Amendment protections, should not be allowed to stand.

The current split among circuits has led to differing applications of Fourth Amendment protections and the exceptions thereto as can be easily seen when these tests are applied to the facts at hand. With so many different tests to determine when the exigent circumstances exception to the Fourth Amendment warrant requirement is impermissibly created, the lower courts cannot effectively enforce Constitutional protections or this Court's mandates. Only this Court can resolve this ongoing conflict among the circuits that continues to impact both police officers and citizens. A vacillating protection from unreasonable searches and seizures denies all people this fundamental Constitutional right. This imperfect application of the Fourth Amendment protections will continue to mire Constitutional law, until this Court addresses the issue.

This Court should grant certiorari to determine whether police can impermissibly create exigent circumstances and if so, to acknowledge and resolve the current conflict among the circuits, and set forth an effective and simple test, such as the test adopted by the

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[7]The varying tests used by the states to determine when police impermissibly create exigent circumstances also result in directly contradictory results, however for brevity's sake those results will not be set forth here

Second Circuit, to determine when police impermissibly create exigent circumstances.

B. The Kentucky Supreme Court Erroneously Construed the Fourth Amendment

The Kentucky Supreme Court's newly minted hybrid test for determining when police impermissibly create exigent circumstances erroneously construes the Fourth Amendment and the application of this Court's exceptions to its protections. The Kentucky Supreme Court adopted a two-part test that looks first at bad faith (as the Fifth Circuit does) and then at foreseeability (as the Fourth and Eighth Circuits do).

Fourth Amendment protections rely upon an objectively reasonable standard. *Michigan v. Fisher*, — U.S. —, 130 S.Ct. 546, 548 (2009). This is not a standard that inquires into subjective intentions, as do several of the circuits' tests. As is noted by the Second Circuit, speculation by the courts as to police intentions is often futile. *MacDonald*, at 772. This investigation into the bad faith subjective intentions of officers, may encourage police fabrication in hindsight in order to avoid the suppression of evidence obtained after a warrantless entry. Therefore, the first prong of the Kentucky Supreme Court's test (as well as the Fifth Circuit's test) is unusable.

The Kentucky Supreme Court did not find bad faith here and ruled for the Respondent based on its conclusion that the officers should have foreseen that, once they knocked on the door and announced their presence, the apartment's occupants would attempt to destroy evidence. App. 46a. That holding is untenable.

This prong is identical to the test employed by the Fourth and Eighth Circuits. This test relies on the foreseeability of police actions; however, illegal results of lawful police action are arguably foreseeable in most circumstances. Police are trained to expect illegal actions in response to their presence; therefore, a foreseeability test will nearly always condemn police action. A "foreseeability" test threatens to swallow the exigent circumstances exception to the warrant requirement. Moreover, it prevents officers from using commonplace, lawful police tactics such as knocking on doors and questioning suspects.

Even worse, this test rewards the illegal actions of a home's occupants in response to lawful police action. It is the actions of the home's occupants that give rise to the exigent circumstances, not the lawful actions of the officers who are attempting to engage them in conversation. The home's occupants have a choice to engage in a consensual encounter with police (either by speaking with the police and granting them consent or by refusing to speak with them and shutting the door) or to behave in an illegal manner (by destroying physical evidence, fleeing, or drawing their weapons). This Court should not reward illegal responses by preventing officers from responding to them. Such a test flies in the face of common sense and unduly restricts lawful police conduct. Police should not be restricted in their actions where a lawful citizen would not be.

For similar reasons, the test employed by the Third and Fifth Circuits is also erroneous. These circuits purport to assess the "reasonableness" of officers' actions, but in practice their rule holds that the exigent circumstances exception does not apply when exigent

circumstances only come into existence after police, with knowledge that a search warrant could be obtained, knock and announce.

Nor is the "unreasonable delay" test applied by multiple circuits satisfactory. This test places a heavy burden on police to immediately obtain a warrant once probable cause has arisen, even when other lawful courses seem preferable based on the circumstances and the officer's experience. It also means that evidence can be suppressed when a reviewing court, in hindsight, determines that probable cause existed prior to exigent circumstances arising, even though officers at the scene did not believe they had probable cause to obtain a warrant. No Fourth Amendment policy is supported by such an outcome.

In the final analysis, the proper test for determining when police have impermissibly created exigent circumstances would be similar to the test used by the Second Circuit. This test simply asks whether police action was lawful. See *MacDonald*, at 772. Such a test enables the courts to protect the sanctity of the home as described by the Fourth Amendment, while allowing lawful police action. A test of this nature would not reward illegal action on the part of a home's occupants by preventing warrantless entry when exigent circumstances arise.

Most importantly for present purposes, the Kentucky Supreme Court and numerous other states and circuits have adopted tests that improperly reward illegal behavior and restrict lawful police action. Such a test is unworkable. This Court's intervention is needed to rectify this situation.

C. The Issue is a Reoccurring One of National Importance

As this Court has repeatedly recognized, there are well-established exceptions to the Fourth Amendment's warrant requirement that are necessary for police to effectively carry-out their duties. See *Payton v. New York*, 445 U.S. 573 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). On a daily basis, police officers encounter situations in which Fourth Amendment protections are applicable. In most of these situations, the exceptions to the Fourth Amendment warrant requirement are inapplicable. However, in the majority of those cases which reach adjudication, one or more of those exceptions was relied upon by police in effecting seizure or arrest. If police are deemed to have impermissibly created the exigent circumstances upon which they rely for warrantless entry, police action is placed in question in a wide variety of circumstances and a large number of cases.

One of the most common police investigatory procedures is a "knock and talk," in which officers lawfully approach a person's home and engage them in conversation. As then-Justice Rehnquist pointed out in his dissent to this Court's decision in *Dunaway v. New York*, 442 U.S. 200, 222 (1979).

> There is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from

> knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him.

This police investigatory procedure is employed every time an officer approaches a home to speak with the occupants concerning a crime that has occurred. This lawful police action sometimes results in the creation of exigent circumstances - particularly when the police act based on a reasonable suspicion of wrongdoing. Yet under the decision below and the rules adopted by four circuits, the police are barred from acting in response to those exigencies. In those jurisdictions, an officer who hears evidence being destroyed or an individual being attacked - merely because the officer knocked on the door - violates the Fourth Amendment by entering the residence in response to that exigency. It is critical that this Court remove that senseless bar on the ability of the law enforcement community to protect the public.

II. This Court Should Grant Certiorari to Resolve the Conflict over Whether the Hot Pursuit Exception to the Warrant Requirement Applies Only If the Government Can Prove That the Suspect Was Aware He Was Being Pursued.

The touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Although a warrantless entry into one's home by police is presumptively unreasonable, "that presumption can be overcome." *Michigan v. Fisher*, — U.S. —, 130 S.Ct. 546, 548 (2009). "For example, 'the

exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable.'" *Ibid.*, quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

One consistently recognized example of exigent circumstances is the "hot pursuit" of a suspect the police reasonably believe to be a fleeing felon. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). Under that exception, the police are permitted to pursue the fleeing felon into a private residence in order to effect an arrest. *United States v. Santana*, 427 U.S. 38, 43 (1976). This exception is deeply rooted in our common law heritage. 4 W. Blackstone, *Commentaries on the Laws of England*, 292-93 (1775) ("Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon . . . And they may justify breaking open doors upon following such felon . . .").

This Court has not, however, described the precise contours of this exception to the warrant requirement. As a consequence, lower courts are divided on when law enforcement can make a warrantless search in the course of hot pursuit. Resolution by this Court is needed.

A. State Courts Are Divided on this Issue.

In *Commonwealth v. Talbert*, 478 S.E.2d 331, 334 (Va.App. 1996), the defendant argued that in order "for a pursuit to be 'hot,' the suspect must be in flight, knowing that he is being pursued." The Virginia Court of Appeals disagreed. The court noted that "hot pursuit,"

as with other exigent circumstances inquiries, "relates to the circumstances governing the officer's conduct, to the situation as reasonably perceived by the officer, and must be assessed from the officer's perspective." *Ibid.* The Virginia court did not disregard actions of the suspect. Those actions were merely a part of the totality of the circumstances. *Ibid.* ("Elusive action by the suspect will bear on this assessment, but the suspect's awareness and perceptions are not, as such, determinative."). See also *State v. Ricci*, 739 A.2d 404, 406 (N.H. 1999) (following *Talbert*, but deciding case under state constitution).

The Geogia Court of Appeals and Kentucky Supreme Court, on the other hand, have taken a completely different approach. They look to the subjective viewpoint of the felon to determine "hot pursuit." The Georgia appellate court stated that "the key to 'hot pursuit' is that the defendant is aware he is being pursued by the police, and is therefore likely to disappear or destroy evidence of his wrongdoing if the officer takes the time to get a warrant." *State v. Nichols*, 484 S.E.2d 507, 508 (Ga.App. 1997). The Kentucky Supreme Court followed the holding of *Nichols* in determining that the police were not in hot pursuit of a fleeing suspect. App. 40a-41a ("An important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued."), citing *United States v. Santana*, 427 U.S. 38, 43 (1976). Accordingly, the Kentucky Supreme Court held that no hot pursuit existed in the present case because "there [was] no evidence that [Respondent] was aware of [the fact that uniformed officers were in pursuit of him]." App. 40a.

Under the two views discussed above, the Fourth

Amendment is applied differently simply based on geography. Kentucky and its border state, Virginia, are perfect examples. Had the Respondent in this case made the sale in Virginia, a Virginia court would have determined that he was a fleeing felon and that determination would have been made by looking at the viewpoint of a reasonable officer. Since the fleeing felon exigent circumstance would be applicable, the officers would have had the right to make a warrantless entry into Respondent's home.

Respondent, however, did not make the sale in Virginia. He made it in Kentucky where the courts determine "hot pursuit" from the subjective viewpoint of the fleeing felon. Here, the Commonwealth was unable to offer evidence of the Respondent's subjective point of view. Thus, the Kentucky Supreme Court determined that the police officers were not in hot pursuit.

This Court should grant certiorari to prevent divergent application of the hot pursuit exception to the warrant requirement across the many jurisdictions of the United States.

B. The Kentucky Supreme Court's Decision Conflicts with Precedents of this Court and Other Courts that Apply an Objective Standard for Assessing Reasonableness Under the Fourth Amendment.

The Kentucky Supreme Court's holding that the suspect must know he is being pursued before hot pursuit applies runs afoul of the Fourth Amendment's reasonableness standard, which this Court has repeatedly held to be an objective standard that does not

look at officers' or suspects' subjective intentions or thoughts. *Santana*, 427 U.S. at 43, relied upon by the Kentucky Supreme Court to support its holding, says nothing of the subjective intentions of the fleeing felon.

In the case closest on point, *Warden v. Hayden*, 387 U.S. 294 (1967), this Court rejected a Fourth Amendment challenge to a police entry into a residence where the police were informed that a suspect, wanted in connection with an armed robbery, had entered a residence less than five minutes before. Even though the suspect was unaware he was being pursued, the Court determined that the officers acted reasonably. *Id.* at 298-99.

Hayden did not specifically employ the term "hot pursuit." However, in *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), this Court cited *Hayden* as a "hot pursuit" case. As the Virginia Court of Appeals put it, "[a]lthough Hayden was unaware that he was being pursued, the urgency of the timing and of the circumstances confronting the police constituted their entry into the house a 'hot pursuit.'" *Ibid.*[8] Similarly here, that the fleeing felon may not have realized he was being pursued is of no moment for Fourth Amendment purposes. Like the officers in *Hayden*, the officers here were in hot pursuit based on an objective determination from the reasonable officer's point of view.

An objective test as set forth in *Talbert* is also in

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[8]See also *United States v Bass*, 315 F 3d 561, 562-63 (6th Cir 2002) (officers were in hot pursuit despite having arrived minutes after suspect fled the scene), *United States v Haynie*, 637 F 2d 227, 235-36 (4th Cir. 1980) (officer entry into home was in hot pursuit of co-defendant who entered house "moments before" police arrived)

keeping with other aspects of the "hot pursuit" doctrine. For instance, whether the person being pursued is actually a felon is judged in terms of objective reasonableness. The First Circuit has held that "an officer who is looking for a fleeing suspect and has a reasoned basis to think that he has found the suspect is justified in pursuing the suspect into a house." *United States v. Soto-Beniquez*, 356 F.3d 1, 36 (1st Cir. 2004). See also *Ibid.*, citing *United States v. Lopez*, 989 F.2d 24, 27 (1st Cir. 1993) (holding that police were justified under the hot pursuit doctrine in following defendant into a house because he fit a general description of an armed assault suspect and ran from police when he was ordered to halt).

The objective test as set forth in *Talbert* is also in keeping with Fourth Amendment jurisprudence regarding exigent circumstances in general. For instance, this Court in *Brigham City* "clarified . . . that whether the officers' motivation for entering is to arrest suspects and gather evidence or to assist the injured is irrelevant so long as the circumstances objectively justify the action." *United States v. Huffman*, 461 F.3d 777, 782-783 (6th Cir. 2006), citing *Brigham City*, 547 U.S. at 404.

The Tenth Circuit has held that whether exigent circumstances exists is determined by "the facts from the viewpoint of prudent, cautious, and trained officers." *United States v. Porter*, 594 F.3d 1251, 1258 (10th Cir. 2010) (internal quotations omitted). See also *United States v. Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996) (same); *United States v. Erb*, 596 F.2d 412, 419 (10th Cir. 1979) (same). And the Tennessee Supreme Court

has described the test as follows: "The exigency of the circumstances is evaluated based upon the totality of the circumstances known to the governmental actor at the time of the entry." *State v. Meeks*, 262 S.W.3d 710, 723 (Tenn. 2008) (internal footnotes omitted). Various federal circuits have similar tests. See *e.g.*, *United States v. Hogan*, 539 F.3d 916, 922 (8th Cir. 2008); *United States v. Klump*, 536 F.3d 113, 117 -118 (2nd Cir. 2008); *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008); *United States v. Atchley*, 474 F.3d 840, 850 (6th Cir. 2007); *United States v. Maldonado* 472 F.3d 388, 393 (5th Cir. 2006); *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3rd Cir. 2003).

The test employed by both the Georgia Court of Appeals and the Kentucky Supreme Court violate a main tenant of Fourth Amendment law – objective reasonableness. Both courts take the objective reasonableness test ordinarily used in Fourth Amendment analysis and replace it with a subjectively-based test that is grounded on the viewpoint of the accused. This test has no basis in our Fourth Amendment jurisprudence. Indeed when it comes to the Fourth Amendment, this Court has routinely stated that subjective intentions are irrelevant. *Whren v. United States*, 517 U.S. 806, 818 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Michigan v. Chesternut*, 486 U.S. 567, 575 n. 7 (1988)("the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"). This rule should be equally applicable to

the subjective intentions of the fleeing felons.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

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APPENDIX

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs FINDINGS OF FACT, CONCLUSION OF LAW, OPINION AND ORDER

CLARENCE JOHNSON
HOLLIS KING AND
JAMELA WASHINGTON DEFENDANTS

****

This matter is before the Court on written Motions to Suppress evidence seized by law enforcement officers on or about October 13, 2005 which led to the Indictment and Charges against the three Defendants herein, namely Clarence Johnson, Hollis King and Jamela Washington. The Court conducted an Evidentiary Hearing on March 23, 2006 at which time Officer Steve Cobb testified in person and the Court heard Arguments of Counsel and established a Briefing Schedule for all Counsel to submit written Briefs on the issues presented. The Court has now had the opportunity to review the Briefs filed by all Counsel and, being otherwise sufficiently advised, now renders its Findings of Fact, Conclusion of Law, Opinion and Order on the pending Motions to Suppress as follows:

FINDINGS OF FACT

On or about October 13, 2005 Officer Steve Cobb was involved with other uniform officers, some under-cover officers and a Confidential Informant in a "buy-bust" operation in the Centre Parkway area of Lexington. Officer Cobb testified that a "buy-bust" operation is a law enforcement technique whereby a Confidential Informant, after appropriate precautions and preparations, is sent to purchase illegal drugs from a street level trafficker. This operation would then result in the arrest of the drug trafficker. Officer Cobb explained that his part of the "buy-bust" operation was to move in and make an arrest after the Confidential Informant had purchased the illegal drugs from the street level trafficker after he had been so advised by under cover officers via radio communications.

At about 9:50 p.m. on October 13, 2005 in the area of 1300 Centre Parkway, through the observations of under cover Det. Givens, it was learned that the Confidential Informant had been approached by a subject and had gotten into a vehicle with that subject. Det. Givens was in eye contact with the Confidential Informant and subject and was personally observing this activity. Det. Givens personally observed that a drug transaction had occurred between the Confidential Informant and the suspect. Based on that observation, Det. Givens gave the pre-arranged signal for Officer Cobb and other uniformed officers to go out and arrest the subject from whom the Confidential Informant had just purchased illegal narcotics. Det. Givens described the subject to be arrested as a Male Black wearing a red sweat shirt with a hood ("hoodie"), jeans and tennis shoes. The suspect

had been observed going in to the breezeway of a certain apartment complex located at 1317 Centre Parkway.

At this point, Officer Cobb had gotten out of his marked vehicle and, along with other uniform officers, had moved into the area where Det. Givens had last seen the suspect in the breezeway area as aforesaid. Because Officer Cobb and the other uniform officers had started to move into the described area where the suspect was last seen immediately upon getting the "go" signal from Det. Givens, neither he nor any of the other officers moving in to make the arrest of the suspect heard Det. Givens give one additional crucial bit of information via radio communications. Det. Givens had radioed the additional information that the suspect went into the back right apartment of the apartment unit from the breezeway described. Neither Officer Cobb nor any other officer heard this last bit of information.

Not having this last bit of crucial information, Officer Cobb and the other uniform officers went into the breezeway looking for the suspect not knowing that Det. Givens had observed the suspect going into the back right apartment of the breezeway area. Officer Cobb and the others heard a door shut but could not determine which apartment door or which exact apartment was the location where that had just occurred. Officer Cobb and the others started smelling a burnt marijuana smell about halfway down the breezeway. Upon getting to the end of the breezeway, Officer Cobb and the others smelled a strong odor of burnt marijuana coming from underneath the door of the back left apartment. Det. Maynard, who was accompanying Officer Cobb in the breezeway attempting to locate and arrest the suspect in question, banged on the door of the apartment

on the back left of the breezeway identifying themselves as police officers and demanding that the door be opened by the persons inside. The apartment number of the back left unit was Apt. 78 whereas the apartment number for the back right unit which Det. Givens had observed the suspect going into was Apt. 79. Officer Cobb testified, and the Court Finds, that the officers involved had the requisite training and experience to know the unique smell of burnt marijuana.

After Det. Maynard announced the presence of the police officers at the door of the back left apartment, Apt 78, Officer Cobb and the others heard "things being moved in that apartment (78)". Officer Cobb later described the noise as people moving around as opposed to furniture being moved. It seemed to the officers that the occupants of Apt. 78, from which the strong odor of burnt marijuana had been smelled, may have been in the process of destroying evidence. Because of Officer Cobb's fear that the persons inside Apt. 78 were in the process of destruction of evidence, Officer Cobb knocked the door down to Apt. 78 by kicking it open. Officer Cobb and the other uniform officers then entered Apt. 78. They immediately conducted a protective sweep of the apartment while observing three subjects in the front room. The three subjects observed upon entering the apartment turned out to be three defendants in the within cause of action. One subject (Johnson) was observed smoking a marijuana cigarette. The officers also observed, in plain view, illegal narcotics and drugs on the coffee table in the unit. All three subjects were placed under arrest and given appropriate Miranda warnings. As aforesaid, Officer Cobb and the others observed marijuana and powder cocaine on the coffee

table in plain view. This evidence was seized and later determined to be 25 grams of marijuana and 4.6 ounces of powder cocaine.

After their arrest and being given the appropriate Miranda warnings, Defendant Washington took responsibility for all of the drugs in the apartment. Officer Cobb noted strong eye contact between Defendant Washington and Defendant King while Washington was making these statements. Defendant King refused any comment. Defendant Johnson told the officers that he was just in the apartment to get high and that none of the items seized were his drugs. A subsequent search of the apartment by the officers turned up two marijuana pipes, some marijuana "roaches", some crack cocaine, some scales and other drug paraphernalia, $2,500.00 in cash and three cell phones. All of these items were seized and are the evidence upon which law enforcement relies in its prosecution of these three Defendants on the pending Charges.

It was undisputed testimony that when Officer Cobb, Det. Maynard and the other uniform officers entered the breezeway in question and started down the hall toward the back apartments that the officers did not know into which the apartment the suspect which they were seeking as described by Det. Givens had entered. They had heard an apartment door shut, but they could not tell from which apartment the noise had come. These officers going to arrest the suspect in question did not have the information that Det. Givens had transmitted via radio communications that the suspect in the aforementioned "buy-bust" operation had run into Apt. 79, the right rear apartment.

When asked directly to articulate the reasons which he thought justified the forced entry into Apt 78 (apartment on back left of hall) by knocking down the door, Officer Cobb testified that he and the other officers thought that there was a crime occurring inside Apt 78 based on the strong odor of burnt marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in destruction of evidence. Officer Cobb candidly admitted that there is no legal obligation for occupants of these apartments or any other residence or dwelling unit to open the door to a knock and demand from law enforcement officers. Officer Cobb also candidly admitted that people move inside apartments without being involved in illegal criminal activity. Officer Cobb and the other officers thought that drugs were being destroyed inside Apt. 78 which justified knocking down the door to that unit. Sometime subsequent to the apartment 78 door being knocked down and the three Defendants in this case being arrested, Apt 79 was also entered and the suspect who had been bserved in the "buy-bust" operation was arrested. For some reason not explained at the Evidentiary Hearing, the charges against the suspect in Apt 79 were later dismissed.

CONCLUSION OF LAW

The first legal issue presented is whether or not all three Defendants have "standing" to challenge the warrantless entry into the subject apartment and the seizure of the evidence at issue. Defendant Washington rents the apartment so she clearly has the requisite standing as is conceded by the Commonwealth.

Defendant King and Defendant Washington have a child together which prompts Defendant King to have frequent and extended visits and living there. The Commonwealth again concedes that Defendant King has the requisite standing to challenge this seizure. Defendant Johnson was apparently a guest in the apartment. The Commonwealth argues that Defendant Johnson had no expectation of privacy as a guest in this particular apartment.

The issue of whether or not a defendant has an expectation of privacy in the area searched is determined upon the facts of each particular case. Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1984). Unlike the case in Rawlings v. Commonwealth, 448 U.S. 98 (1980) where a defendant challenged the search of his female friend's purse, Defendant Johnson in the case at bar was an invited guest into anther's "castle" i.e., apartment. The Court Concludes that defendant Johnson does have standing to challenge this search and seizure as he would have a reasonable expectation of privacy as a guest in another person's apartment under these circumstances. Therefore, the Court Concludes that all three Defendants have the requisite standing to challenge the search and seizure at issue.

All warrantless searches are presumed to be unreasonable and unlawful, requiring the Commonwealth to bear the burden of justifying the search and seizure under one of the expectations to the warrant requirement. Commonwealth v. Erickson, 132 S.W.3d 884, 887 (Ky.App. 2004); Cook v. Commonwealth, 826 S.W.2d 329, 331 (Ky. 1992). The right of the people to be secure in their persons and houses against unreasonable searches and seizures has

been an established Constitutional right from the beginning of our nation. United States Constitution, Amendment IV. Kentucky has also recognized the prohibition against unreasonable searches and seizures through its Constitution. Kentucky Constitution, Section 10. It hardly requires citation of authority to note that a warrant is ordinarily required to enter a person's home. The United States Supreme Court has held that "the Fourth Amendment has drawn a firm line at the entrance to the house", adding that "absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 455 U. S. 573 (1980). "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." Id. at 590; Coolidge v. New Hampshire, 403 U.S. 443 (1971). Nevertheless, there are exceptions to this warrant requirement, including "...imminent destruction of evidence." Minnesota v. Olsen, 495 U.S. 91(1990). With these Constitutional principles firmly in mind, the Court addresses the legal issues in the case at bar.

The Commonwealth argues that because of the smell of burnt marijuana coming from under the door at Apt. 78 where the three Defendants were inside, coupled with the hearing of the movement inside the apartment by Officer Cobb and the others, the conclusion of Officer Cobb and the others that exigent circumstances existed for entering the apartment due to the possible destruction of evidence justified the warrantless entry into the subject apartment. Exigent circumstances justify a warrantless entry into a home only where there is also probable cause to enter the residence. United

States v. Sangineto-Miranda, 859 F.2d 1501, 1511 (6th Cir. 1988). It is also recognized that the exigent circumstances exception providing for a warrantless entry may be particularly compelling where narcotics are involved, for narcotics can be easily and quickly destroyed while a search is progressing. Sangineto-Miranda, supra at 1511.

In the case at bar, this Court finds as a matter of Fact and Concludes as a matter of Law that the smell and odor of burnt marijuana coming from beneath the door at Apt 78, considering the training and experience of Officer Cobb and others to the unique smell, provided the requisite probable cause for the officers to go forward with their investigation. This continued investigation was properly conducted by initially knocking on the door of the apartment unit and awaiting the response or consensual entry. When there was no response at all to the knocking, coupled with the fact that Officer Cobb heard movement in the apartment which he reasonably concluded were persons in the act of destroying evidence, particularly narcotics because of the smell, this constituted the requisite exigent circumstances which justified the warrantless entry into the apartment as aforesaid. In the end analysis, the officers initially had probable cause to continue their investigation because of the unique odor of burnt marijuana coming from the apartment unit, and there being no response to their knock on the door coupled with the movement inside the apartment which the officers believed were persons in the act of destroying evidence, the requisite exigent circumstances existed which justified the warrantless entry.

The facts in this case are not disputed. Taking each

step in a logical manner demonstrates that this case has the necessary probable cause and exigent circumstances present to justify the warrantless entry. The act of a police officer knocking down the door to a citizen's residence is not taken lightly by this Court. The Court has kept the Constitutional principles set out above firmly in mind as the legal research was conducted and applied to the undisputed facts in this case.

CONCLUSION

Based on the undisputed Findings of Fact from the Evidentiary Hearing conducted on March 23, 2006 and the Conclusions of Law by the Court that officers had both probable cause to continue the investigation, there existed exigent circumstances because of the officers' fear that persons inside the apartment were in the act of destroying evidence.

Based upon all of the foregoing Findings of Fact and Conclusions of Law, the Motion of the Defendants to Suppress the evidence seized is hereby DENIED.

Dated this 2nd day of June, 2006.

Hon. James D. Ishmael, Jr.
Hon. James D. Ishmael, Jr.

This is to certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Opinion and Order was served upon the following parties via First Class Mail this 2nd day of June 2006:

Robert Freidman, Esq.

Attorney for Clarence Johnson

Matthew Boyd, Esq.
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WILMA F. LYNCH, C.F.C.C.
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RENDERED: MARCH 14, 2008
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2006-CA-002033-MR

HOLLIS KING — APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CR-01500

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

1 Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

THOMPSON, JUDGE: Hollis King appeals from a judgment of the Fayette Circuit Court following his conditional guilty plea to trafficking in a controlled substance, first degree; possession of marijuana; and

being a persistent felony offender in the second degree. Pursuant to his plea, King reserved the right to appeal the denial of his suppression motion. For the reasons set forth herein, we affirm.

On October 13, 2005, Officer Steve Cobb and other officers from the Lexington-Fayette County Police Department were conducting an undercover "buy-bust" operation at an apartment complex in the area of 1300 Centre Parkway.

To conduct the operation, an undercover informant parked his truck in a parking lot adjacent to an apartment building, and Officer Givens,[2] in an unmarked car, positioned himself so that he had visual contact with the informant's truck where potential drug transactions would take place. Additionally, Officers Cobb, Maynard, and Simmons were each positioned in nearby locations so that they could quickly respond if a drug transaction were to occur.

2 While we are using the name referenced in the trial court's suppression order, the name Gibbons has also been used in other documents in the record.

Shortly before 10:00 p.m., after receiving a signal from the informant, Givens radioed to the three officers that a drug transaction had been completed. The officers then hurriedly proceeded to the parking lot where the drug transaction had occurred. As he listened to his car radio while driving to the scene, Cobb heard Givens describe the suspect as a black male, wearing jeans, tennis shoes, and a red shirt.

Cobb further heard Givens state that the suspect had entered the breezeway of apartment building 1317.

After Cobb reached the scene and exited his car in pursuit of the suspect, Givens radioed that the suspect was entering the right, rear apartment of building 1317. However, by the time of this transmission, Cobb testified that he was too far away from his car radio to hear the transmission.

When officers entered the apartment building's breezeway, they heard a door being slammed shut in the vicinity of the two rear apartments. As officers approached the midpoint of the breezeway, they smelled a strong odor of marijuana. After reaching the end of the breezeway, the officers realized that the strong odor of marijuana was emanating from the left, rear apartment.

Although they had not observed which door the suspect had entered, based on the source of the marijuana odor, they believed that the left door had recently been opened and shut. Thus, the officers believed that the fleeing suspect had entered the left apartment. After knocking on the door and announcing themselves as police, Cobb heard movement inside the apartment and feared that felony evidence might be destroyed if immediate action was not taken.

He then kicked in the door and performed a protective sweep of the apartment. In the apartment, Cobb observed narcotics on the coffee table and kitchen counter, and discovered a substantial amount of cash in the apartment. At this point, King and the two other occupants of the apartment were arrested. Shortly after these arrests, the original suspect was located in the apartment across the hall from King.

After being indicted, King and his two co-defendants moved to suppress the drug evidence found in his apartment on the basis that it was the fruit of an

unlawful search. At the joint suppression hearing, King's counsel focused on the inconsistency between Cobb's written post-incident report and his suppression hearing testimony.

During the hearing, Cobb testified that he had not heard Givens' radio transmission that the suspect had entered the right, rear apartment. However, his post-incident report indicated that he had heard the transmission. According to Cobb, he included Givens' transmission in his report because Givens had informed him that he (Givens) had made the transmission during the pursuit of the suspect not because he himself had actually heard the transmission at the time of the incident.

At the conclusion of the hearing, the trial court asked Cobb the following:

> COURT: When you and the other officers went down the breezeway toward both 78 and 79, did you know which of those two apartments that the suspect had gone into?[3]
>
> COBB: When I entered that breezeway, no.
>
> COURT: So you just knew the suspect from the "buy-bust" had gone into that breezeway and went down that hallway.
>
> COBB: Yes, sir.

[3] King's apartment number was 78; and the right, rear apartment was number 79.

Following the hearing and the submission of briefs, the trial court denied King's motion to suppress as well as the motions of his co-defendants. In its order, the trial court wrote that:

> In the end analysis, the officers initially had probable cause to continue their investigation because of the unique odor of burnt marijuana coming from the apartment unit, and there being no response to their knock on the door coupled with the movement inside the apartment which the officers believed were persons in the act of destroying evidence, the requisite exigent circumstances existed which justified the warrantless entry.

After the entry of this order, King entered a conditional guilty plea and was sentenced to ten (10) years' imprisonment. This appeal followed.

On appeal, King contends that the trial court erred when it denied his motion to suppress the evidence obtained as a result of the warrantless entry and search of his apartment. Specifically, he contends that the search of his apartment was conducted in violation of the Fourth Amendment to the United States Constitution because it was unsupported by probable cause and an exigent circumstance.

On appellate review of a trial court's denial of a motion to suppress, we apply a two-step process in determining whether the trial court's ruling was correct. *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky.2004). First, we review the trial court's findings of fact under the substantial evidence standard. *Id.* Under this

standard, an appellate court will not disturb a trial court's findings of fact if they are supported by substantial evidence. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 549 (Ky.2000).

"Substantial evidence is defined as 'evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons].'" *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 579 (Ky.2002).

After completing the first step, we then conduct a *de novo* review of the trial court's application of the law to the established facts to determine whether its ruling was correct as a matter of law. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky.1998). In conducting a *de novo* review, we afford no deference to the trial court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App.1998).

As to the trial court's findings of fact, although King points out an inconsistency between Cobb's written post-incident report and his suppression hearing testimony, the trial court's own questioning revealed that Cobb was not aware of which apartment the suspect had entered when the officers entered the breezeway of the apartment building. Further, Cobb's testimony was very detailed and clear.

Accordingly, after reviewing the entire record and because we cannot substitute our version of the facts for those of the trial court, even when there is conflicting evidence in the record, we conclude that the trial court's findings of fact were supported by substantial evidence. *R.C.R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky.App.1998).

It is well-settled that searches and seizures inside a home without a warrant are presumptively unreasonable under the Fourth Amendment of the United States Constitution. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). However, this general rule may be overcome by the existence of any one of the several valid exceptions to the warrant requirement. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky.1992).

These exceptions, often called exigent circumstances, include situations in which an officer reasonably acts to prevent the possible destruction of evidence. *Taylor v. Commonwealth*, 577 S.W.2d 46, 48 (Ky.App.1979). When police seek to justify a search upon an exigent circumstance, the Commonwealth bears the burden to demonstrate that the search came within an exception. *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky.1979).

Further, to support a warrantless search of a private residence, the exigent circumstance must be coupled with a finding of probable cause. *Southers v. Commonwealth*, 210 S.W.3d 173, 176 (Ky.App.2006). "Probable cause for a search exists when the facts are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538 (Ky.App.2003).

Here, police observed a drug transaction involving the felony trafficking of crack cocaine. As nearby-stationed officers rushed to the scene to arrest the suspect, they observed him run into the breezeway of an apartment building. As officers entered the breezeway, they heard a door being slammed shut in the

vicinity of the two rear apartments.

After reaching the rear apartments, they believed that the suspect had entered the left door because of the strong smell of marijuana surrounding it. After knocking, announcing themselves as police, and hearing movement inside the apartment consistent with the destruction of evidence, the officers kicked in the door. After entering, police found illegal drugs and the three occupants were arrested.

Based on these facts, we believe that their warrantless entry was valid under the destruction of evidence exception to the prohibition against the warrantless entry of a home. Although the trial court's ruling that the warrantless entry was valid was correct, we disagree with its legal analysis and now state the correct rule of law.

"Destruction of evidence is a recognized exigent circumstance creating an exception to the warrant requirement." *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky.2006) (quoting *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky.2003)). If officers have probable cause to believe that a crime has occurred and that evidence from that crime is in imminent danger of being destroyed, they may secure the place where the evidence is located in order to prevent its imminent destruction. *Id.*

The U.S. Supreme Court, in explaining when a situation becomes imminent, held that it is reasonable to permit police to secure the location without a warrant where police action literally must be "now or never" to preserve evidence of a crime. *Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S.Ct. 2796, 2802, 37 L.Ed.2d 757 (1973).

In its written order, as previously noted, the trial court ruled that the smell of marijuana gave police officers "probable cause to continue their investigation." Further, the trial court ruled that this probable cause permitted the police to knock on King's door and then execute a warrantless entry after hearing movement inside the apartment. This analysis is incorrect.

From our examination of the relevant case law, we conclude that the odor of burnt marijuana emanating from a residence standing alone does not justify the warrantless entry of that residence even when police knock and announce their presence and hear movement consistent with the destruction of evidence inside the apartment.

Police cannot create exigent circumstances even when they possess probable cause that a crime has been committed. *United States v. Williams*, 354 F.3d 497, 504-05 (6th Cir.2003). In determining whether police have created exigent circumstances, courts have ascertained whether the police have willfully disregarded or recklessly ignored the warrant requirement.

From the case law, particularly *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir.2005), *McDonald v. United States*, 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and *Williams*, 354 F.3d at 504-05, courts have examined the unique circumstances of each case and decided if there was some point during the events culminating with the search that the government's failure to obtain a search warrant was solely due to their deliberate attempt to circumvent the warrant requirement. If such deliberate conduct is found, the search is invalidated due to law enforcement's

creation of the exigent circumstance.

Specifically, in *Chambers* at 566, the court wrote that:

> [W]e reviewed a number of the "created-exigency" cases that apply the emergency and inadvertence principle which, we said, cannot be met "if the police controlled the timing of the encounter giving rise to the search." Our review concluded that "the created-exigency cases have typically required *some showing* of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement."

(Citation omitted).

Having set out the applicable law, the trial court's analysis that officers are legally permitted to approach a residence after smelling marijuana, knock on the door, and make a warrantless entry into the residence after hearing movement within the residence is incorrect. To the contrary, such conduct constitutes the impermissible creation of an exigent circumstance by police and, therefore, invalidates any search predicated on this ground. *Id.*

However, under the circumstances of this case, we conclude that the police did not engage in deliberate and intentional conduct to evade the warrant requirement. While it was possible that the suspect may have never been aware of the officers' presence, it cannot be concluded as a matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence. *United*

States v. Knights, 534 U.S. 112, 118-119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (reasonableness is the touchstone of Fourth Amendment analysis).

Moreover, while King places great significance in the fact that he was not the original suspect nor was he aware of the presence of police, the warrantless entry and search of his apartment was still valid. First, while we recognize that the police mistakenly believed that the suspect had entered the left, rear apartment when in fact he had entered the right apartment, their mistaken belief did not invalidate the constitutionality of the warrantless entry.

Under the "good-faith" exception, when police reasonably (though erroneously) believe that they a pursuing a suspect, the legality of their warrantless entry into a residence is not invalidated solely because their belief that the suspect had entered the residence was erroneous. *Perkins v. Commonwealth*, 237 S.W.3d 215, 219 (Ky.App.2007).

Second, in *Devenpeck v. Alford*, 543 U.S. 146, 152-155, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), the Court discussed the mind state of police in relation to analyzing the existence of probable cause. The Court stated that whether probable cause exists "depends upon the reasonable conclusion to be drawn from the *facts known to the arresting officer at the time* of . . . [his action]." *Id.* at 152.

This standard for analyzing the validity of a police officer's belief that he had probable cause to take a particular action is equally applicable to determining whether a police officer's belief as to the existence of an exigent circumstance is constitutionally valid. To conclude otherwise would render the constitutionality of

a warrantless entry into a defendant's home on the infallibility of police (i.e., the validity of a search would hinge on whether or not the pursuing officer correctly identifies which apartment the fleeing suspect entered). This is an undesirable outcome.

The correct standard, when applied to the facts of this case, is whether or not the officers reached a reasonable conclusion (to enter the left apartment) based on the facts known to them at the time of the forced entry. Id. Although hindsight informs us that the officers chose the wrong door, this does not invalid the constitutionality of the search because the officers' actions were reasonable under the circumstances at the time of their entry.

Moreover, the United States Supreme Court has held "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). The application of the exigent-circumstances exception for the purpose of a warrantless entry into a home has a much greater application when there is probable cause to believe that a major offense has been committed than when only a minor offense has been committed. *Id.*

In *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir.1998), the court succinctly stated the exigency standard regarding the destruction of evidence as follows:

> An exception to the warrant requirement that allows police fearing the destruction of evidence to enter the home of an unknown suspect should be (1) pursuant to clear evidence of probable cause,

> (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indications of exigency that are not subject to police manipulation or abuse.

Therefore, because the police were pursuing a suspected felony crack cocaine dealer following a "buy-bust" operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime, we conclude that the warrantless entry into King's apartment was valid. For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: I respectfully dissent. This case is the companion case to *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky.App.2007), and involves Washington's co-defendant, King.[4]

[4] These two cases should have been consolidated and sent to the same panel for disposition, but inadvertently they were not. The judges that are the majority in this case were on the panel that decided the *Washington*

case; I was not.

First, I agree with the majority that the basis of the trial court's ruling is erroneous. The trial court held that exigent circumstances arose when the officers, who had smelled the odor of marijuana coming from the apartment, knocked on the apartment door and identified themselves, and when those inside did not open the door but moved around in a manner causing the officers to fear that evidence (marijuana) was about to be destroyed. I agree with the majority that the odor of marijuana emanating from a residence, followed by a knock on the door by the officers and the announcement of their presence and the subsequent movement inside, on those facts alone, does not justify a warrantless entry into the residence because the exigent circumstance of fear of destruction of the evidence was created by the officers when they knocked and announced their presence.

Exigent circumstances generally do not exist if the person is unaware of the police presence. *See United States v. Santa*, 236 F.3d 662, 669-70 (11 th Cir.2000); *United States v. Coles*, 437 F.3d 361, 371 (3 rd Cir.2006); *Dunnuck v. State*, 367 Md. 198, 786 A.2d 695 (Md.App.2001). King and the inhabitants of the apartment were unaware of the presence of the officers until the officers knocked on the door and announced their presence. In other words, the exigency did not arise until the officers knocked on the door and announced their presence, causing those inside the apartment to become alarmed and perhaps to begin to destroy the marijuana. Absent the additional facts surrounding the officers' pursuit of the suspect, the warrantless search in this case was otherwise invalid.

In *United States v. Chambers*, 395 F.3d 563 (6 th Cir.2005), the Sixth Circuit held that "[w]arrantless searches are not permitted when the only exigency is one that is of the officer's creation." *Id.* at 566. The test has been stated by the Arkansas Supreme Court as "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826, 834 (Ark.2004). Therein, the court held that the evidence was seized as a result of an unlawful search because "[t]he only exigent circumstance offered by the State, that the officers feared that the evidence was about to be destroyed, was effectively created by the officers' chosen tactics in this case." *Id.* at 436, 161 S.W.3d 826.

Likewise, in *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir.1986), the Fifth Circuit held that the exigent circumstances relied upon by officers to justify a warrantless entry of a condominium were the result of the officers' decision to approach and announce their presence. *Id.* at 298-99. In *United States v. Richard*, 994 F.2d 244 (5th Cir.1993), the Fifth Circuit held a warrantless search to be unlawful due to lack of exigent circumstances where the officers knocked on the door and announced their presence, heard a commotion inside, and then kicked the door down due to fear that evidence was being destroyed. *Id.* at 249-50.

As the aforementioned principles of law are applied to the facts of this case, the trial court erred in upholding the warrantless search based on the narrow grounds it stated. It is apparent that the officers had probable cause to believe a crime was being committed (possession

of marijuana) and the opportunity to seek a warrant after smelling the odor of marijuana. Instead, they knocked on the door and announced their presence. When the occupants of the apartment became aware of the presence of the officers, they began to move around rather than open the door. Exigent circumstances due to fear of destruction of evidence arose at that time. Absent the additional facts surrounding the officers' pursuit of the suspect, the exigent circumstance exception based on fear of destruction of evidence does not apply because the officers could have obtained a warrant before knocking, and the exigency was created by their own actions.

However, while the majority properly rejects the trial court's ruling as erroneous because the officers created the exigency, it continues to rely on the exigent circumstance of destruction of evidence. It does so on the basis of its conclusion that because the officers were pursuing a person suspected of committing a crime just minutes before, they were not deliberately and intentionally evading the warrant requirement. Referencing the good faith exception to the warrant requirement, the majority states that it cannot conclude as a matter of law that it was unreasonable for the officers to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence. I have several concerns with this analysis.

While the majority rejects the destruction of evidence exception in this case because the officers created the exigency, it nevertheless embraces the exception because the officers acted, in the opinion of the majority, in good faith.[5] The good faith exception does not apply to warrantless searches such as the one in this case. In

United States v. Whiting, 781 F.2d 692, 698 (9th Cir.1986), the Ninth Circuit noted that the good faith exception "is clearly limited to warrants invalidated for lack of probable cause and does not create the broad 'good faith' exception the government suggests." *See also United States v. Warner*, 843 F.2d 401, 405 (9th Cir.1988). Further, in *United States v. Herrara*, 444 F.3d 1238 (10th Cir.2006), the Tenth Circuit explained as follows:

> The authority, from both the Supreme Court and this circuit, indicates that *Leon's* good-faith exception to the exclusionary rule generally applies only narrowly outside the context of a warrant. It has not been applied when the mistake resulting in the Fourth Amendment violation is that of the officer conducting the seizure and search, rather than a neutral third party not engaged in the "competitive endeavor of ferreting out crime."

Id. at 1251. To the extent the majority relies on the good faith exception, I believe its reliance is misplaced.[6] To rely on the good faith exception would be to extend that exception to cases where officers were not acting pursuant to a warrant and also to cases where the mistake was made by the officers and not by someone else such as a neutral magistrate. In my opinion, this court should not extend the principles of the good faith exception in this case.

[5] The Court in the *Washington* case also referenced the good faith exception under these same facts when it

stated that "he [Officer Cobb] had a good-faith belief that the suspect had entered the apartment[.]" *Id.* at 767.

[6] In discussing the good faith exception, the majority cites *Perkins*, 237 S.W.3d 215. The *Perkins* court's gratuitous use of the phrase "good faith" in that opinion was not a basis for its holding therein.

In addition to referencing the good faith exception, the majority cites cases which hold that even where the officers created the exigency that led them to conduct a warrantless search, the search will not be held invalid unless there is some showing that the officers deliberately and intentionally evaded the warrant requirement. *See, i.e., Chambers*, 395 F.3d at 566. While some circuits follow this view, there are others that hold the test is "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *See Mann*, 161 S.W.3d at 172. *See also United States v. Duchi*, 906 F.2d 1278, 1284 (8 th Cir.1990) ("bad faith is not required to run afoul of the standard we adopt and apply here today"). Kentucky courts have not specifically addressed this issue. In my opinion, this court should not blindly follow the Sixth Circuit's view without at least considering the view of the other circuits on this issue.

Next, the majority appears to attempt to validate the warrantless entry in the wrong apartment by implying that the exigent circumstance of hot pursuit may be applicable. However, the majority never directly mentions hot pursuit in its opinion.[7] Again, I have

several concerns with the use of this theory. First, the trial court made no determination that the hot pursuit exception applied. Also, hot pursuit typically involves the suspect's knowledge that the police are pursuing him. *See, e.g.*, Dale Joseph Gilsinger, When Is Warrantless Entry of House or Other Building Justified Under "Hot Pursuit" Doctrine, 17 A.L.R. 6th 327 (2006). It has been held that the key to hot pursuit is that the defendant is aware he is being pursued and is likely to disappear or destroy evidence before police can obtain a warrant. *See State v. Nichols*, 225 Ga.App. 609, 484 S.E.2d 507, 508 (Ga.Ct.App.1997).

[7] As previously noted, the court in the *Washington* case mentioned that Officer Cobb had testified that he was in hot pursuit of a felony suspect.

The majority acknowledges that the suspect may not have known that he was being pursued, but it states that it cannot conclude as a matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence. I agree that we cannot conclude as a matter of law that the actions of the police were unreasonable. However, the majority has reversed the situation and, in essence, determined as a matter of law that it was reasonable for the police to believe that the suspect knew of their presence and that they had to take immediate action to prevent the destruction of evidence. While I believe there is no evidence whatsoever that the suspect in this case was aware that the officers were following him, there is at least a fact issue in this regard and I disagree

that we should conclude to the contrary as a matter of law.

Also, I fail to see the connection between the smell of marijuana coming from a residence and the sale of crack cocaine. Simply because the suspect sold crack cocaine does not give rise to any inference that he must have fled into an apartment where there was the smell of marijuana smoke emanating therefrom. I see no probable cause in this regard.

Further, I fail to see why the police believed that they needed to kick down the door for fear that evidence was about to be destroyed. I agree with the majority that the odor of burnt marijuana emanating from a residence does not justify the warrantless entry of that residence even when police knock and announce their presence and hear movement consistent with the destruction of evidence inside the residence. However, there was no testimony that the officers believed that the suspect they were pursuing had more crack cocaine in his apartment that he was about to destroy or that the money he had received from the drug deal was marked or otherwise identifiable and was in danger of being destroyed. In my opinion, any justification for kicking down the door had to be based on the hot pursuit exception and not the fear of the destruction of evidence exception.

In addition, assuming the hot pursuit exception does apply, there are remaining issues as to whether it applies when the officers don't pursue the suspect into the apartment he entered but rather they kick down the door of the wrong apartment and enter a residence that they otherwise had no right to enter without a warrant. The issue in this regard, as I see it, is not whether the officers acted in good faith, but whether they had an

objectively reasonable belief that the suspect had entered the Washington/King apartment.[8] *See generally Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); *Illinois v. Rodriquez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *Hill v. California*, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971).

[8] The objective reasonableness standard is not the same as the good faith standard. For example, an officer may act in good faith, but his actions may be unreasonable.

My concern in this case is that we uphold the constitutional rights of citizens to be safe and secure from governmental intrusion into their homes without a warrant unless there is a valid exception to the warrant requirement. This case disturbs me because not only did the police kick down the door and enter a home without a search warrant, but they mistakenly invaded the wrong home. The fact that King and Washington may have been violating the law within that residence did not allow such actions in the absence of a determination that the officers' actions were pursuant to a valid exception to the warrant requirement. Although the officers may have been in hot pursuit of another person and may have acted reasonably under the circumstances, I believe that there are fact issues in that regard that should be determined by the trial court and not by this court.

I would vacate the ruling of the trial court and would remand for the entry of specific findings and conclusions as to whether the warrantless entry and search were lawful under the hot pursuit exception. Therefore, I must respectfully dissent.

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SUPREME COURT OF KENTUCKY
2008-SC-000274-DG

HOLLIS DESHAUN KING APPELLANT

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-002033-MR
FAYETTE CIRCUIT COURT NO. 05-CR-1500-2

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT
BY JUSTICE SCHRODER

REVERSING AND REMANDING

At issue in this case is whether exigent circumstances existed, which justified the warrantless entry of the apartment occupied by Appellant Hollis Deshaun King. We hold that police were not in hot pursuit of a fleeing suspect, and that, with regard to the imminent destruction of evidence, any exigency was police-created. We also note that no "good faith" exception to the exclusionary rule applies in this case. We therefore reverse the judgment of the Court of Appeals.

I. BACKGROUND

On the evening of October 13, 2005, Lexington-Fayette County police were conducting a "buy

bust" operation at an apartment complex on Centre Parkway in Lexington. Police arranged for a confidential informant to purchase crack cocaine from a "street level" dealer. Officer Steven Cobb and several narcotics detectives were nearby in marked police cars waiting to make an arrest after a sale was complete.

After a suspected dealer sold crack cocaine to the confidential informant, undercover officer Gibbons gave a prearranged signal, informing officers to move in and make an arrest. As Cobb drove toward the location of the sale to make the arrest, Gibbons radioed a description of the suspect, and stated that he had entered a specific breezeway at the apartment complex. Cobb testified[1] that Gibbons told officers to hurry, in order to keep the suspect from entering an apartment.

[1]Officer Cobb was the only witness to testify at the suppression hearing.

Cobb exited his vehicle, and continued toward the breezeway on foot with two narcotics detectives. After Cobb had exited his vehicle, Gibbons informed officers via radio that the suspect had entered the back *right* apartment. Because they were no longer near a radio, Cobb and the narcotics detectives did not hear this final piece of information. The officers heard a door slam shut, but did not see which apartment the suspect had entered.

When the officers reached the breezeway, they detected the "very strong odor of burnt marijuana." It soon became clear that the smell of marijuana was emanating from the back *left* apartment. Officer Cobb testified at the suppression hearing that this strong odor

led him to believe that the left apartment door had been recently opened. However, Cobb stated that he did not know which door he had heard close.

Detective Maynard, one of the narcotics detectives, knocked loudly on the back left apartment door and announced "police." The three officers then heard movement inside the apartment, which lead the officers to believe that evidence was about to be destroyed.

At this point, the officers made a forced entry into the left apartment. As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Cobb kicked the back left apartment door open, and officers performed an initial protective sweep looking for the original suspect. Though police did not find the suspected drug dealer, they found three people sitting on couches in the apartment: Jamela Washington, Clarence Johnson, and Appellant Hollis King. Johnson was smoking marijuana, while Washington and King sat nearby. Police found approximately 25 grams of marijuana and 4.6 ounces of powder cocaine in plain view. Upon further search, police found crack cocaine, scales with cocaine residue, $2500 in cash, three cell phones, and other drug paraphernalia. Police eventually entered the back right apartment, and found the suspected drug dealer who had been the original target.

King and his co-defendants argued that the police's entry into the apartment was unlawful, and filed motions to suppress all evidence obtained as a result of

that entry. Following a suppression hearing, the circuit court issued extensive Findings of Fact, Conclusions of Law, and an Opinion and Order. As a preliminary matter, the circuit court concluded that King had standing to challenge the search.[2] Next, the court concluded that the smell of marijuana gave the officers probable cause to continue with their investigation. And finally, the court concluded that the lack of response to the knock on the door-coupled with the sound of movement, which the officers believed to be the destruction of evidence-created the requisite exigent circumstances to justify a warrantless entry. Therefore, the circuit court denied King's motion to suppress evidence.

[2] The record indicates that Jamela Washington leased the apartment, that Washington was King's girlfriend, and that King stayed at the apartment at least part of the time.

King entered a conditional guilty plea, reserving the right to appeal the circuit court's denial of his motion to suppress. The circuit court found King guilty of trafficking in a controlled substance; possession of marijuana; and persistent felony offender, second degree (PFO II). For the trafficking charge, the court imposed a sentence of five years' imprisonment, enhanced to ten years by King's PFO status. For the possession charge, the court imposed a sentence of twelve months in jail.

On appeal, the Court of Appeals found fault with the circuit court's conclusions of law. The Court concluded that smelling burning marijuana, knocking on the door, and hearing movement within the residence cannot

justify a warrantless entry. Rather, the Court of Appeals noted, such a search is invalid if the police created their own exigent circumstances. Nevertheless, the Court of Appeals concluded that, "under the circumstances of this case," police did not create their own exigency because they did not engage in deliberate and intentional conduct to evade the warrant requirement, citing *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir.2005). The Court of Appeals also noted a "good faith" exception, and affirmed the circuit court's judgment.[3] This Court then granted discretionary review.

[3] The Court of Appeals also affirmed the conviction of Jamela Washington, King's co-defendant, in *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky.App. 2007). Because Washington conflicts with our opinion in this case, it is hereby overruled.

II. ANALYSIS

We apply a two-prong test when reviewing a trial court's ruling on a suppression motion following a hearing. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App.2000). First, the circuit court's factual findings are conclusive if supported by substantial evidence. *Id.*; RCr 9.78. However, we conduct "a *de novo* review to determine whether the court's decision is correct as a matter of law." *Stewart*, 44 S.W.3d at 380.

Upon review of the record, we conclude that the circuit court's findings of fact were supported by substantial evidence, and are therefore conclusive. We now conduct a *de novo* review of the law as applied to the

circuit court's findings of fact.

A. Police Did Not Have Proper Exigent Circumstances to Justify a Warrantless Entry

It is well established that, under the Fourth Amendment to the United States Constitution, police may not conduct a warrantless search or seizure within a private residence unless there exist both (1) probable cause and (2) exigent circumstances.[4] *Kirk v. Louisiana*, 536 U.S. 635, 638, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Any other search is *per se* unreasonable. Id. at 587, 100 S.Ct. 1371.

[4] Consent also authorizes a warrantless search, but consent is not an issue in this case.

Both parties agree that the smell of burning marijuana created probable cause, which would have been sufficient for the police to obtain a warrant to search the back left apartment. Because the police chose not to seek a warrant, we must now address whether there existed exigent circumstances to justify the warrantless entry. The Commonwealth argues that two types of exigent circumstances justified the warrantless entry: (1) "hot pursuit," and (2) imminent destruction of evidence. We address each of these in the context of this case.

1. The Police Were Not In Hot Pursuit of a Fleeing Suspect

The "hot pursuit" of a fleeing suspect (when accompanied by probable cause as required by *Payton*) is an exigent circumstance justifying the warrantless entry of a home. *United States v. Santana*, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); Warden v. Hayden, 387 U.S. 294, 298-99, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Styles v. Commonwealth*, 507 S.W.2d 487, 488 (Ky.1974). *See also Minnesota v. Olson*, 495 U.S. 91, 100-01, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (reaffirming hot pursuit exception).

An important element of the hot pursuit exception is the suspect's knowledge that he is, in fact, being pursued. *Santana*, 427 U.S. at 43, 96 S.Ct. 2406; *see also State v. Nichols*, 225 Ga.App. 609, 484 S.E.2d 507, 508 (1997) ("Rather, the key to 'hot pursuit' is that the defendant is aware he is being pursued by the police, and is therefore likely to disappear or destroy evidence of his wrongdoing if the officer takes the time to get a warrant."). In this case, uniformed officers were in pursuit of the suspected drug dealer, but there is no evidence that he was aware of this. According to testimony at the suppression hearing, the suspect sold drugs to a confidential informant, and then returned to his apartment.

Officer Cobb testified that police officers had hurried to the scene to prevent the suspect from entering an apartment. Although the suspect entered an apartment before he could be apprehended, there was no testimony that police feared he would escape. Nothing in these circumstances created an exigency that would have

made it impracticable for the police to post officers in the breezeway and obtain a warrant. For these reasons, there was no hot pursuit justifying the warrantless entry of the back left apartment.

2. The Warrantless Entry Was Not Justified by the Imminent Destruction of Evidence

The imminent destruction of evidence is recognized as an exigent circumstance, which justifies a warrantless search when accompanied by probable cause. *Posey v. Commonwealth*, 185 S.W.3d 170, 173 (Ky.2006). *See also Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.") (citations omitted).

As found by the circuit court, Officer Cobb gave two reasons for the decision to enter the left apartment without a warrant: the fact that a crime was occurring based on the odor of marijuana, and the possible destruction of evidence based on the sound of movement inside the apartment.

a. The odor of marijuana did not create exigent circumstances

Odor alone is generally an insufficient basis for the warrantless search of a home based on imminent destruction of evidence. In *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948), the Supreme Court held the warrantless search of a hotel

room invalid where the officers detected "a strong odor of burning opium which to them was distinctive and unmistakable." *Id.* at 12, 68 S.Ct. 367. The Court stated that an odor, sufficiently distinctive to be recognized as an illegal substance, and detected by one qualified to recognize it, can be sufficient to justify the issuance of a warrant. *Id.* at 13, 68 S.Ct. 367. However, odor alone did not justify a warrantless search based on imminent destruction of evidence: "No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court." *Id.* at 15, 68 S.Ct. 367.

The odor of marijuana alone can justify the warrantless search of an automobile. *Cooper v. Commonwealth*, 577 S.W.2d 34, 37 (Ky.App.1979), *overruled on other grounds by Mash v. Commonwealth*, 769 S.W.2d 42 (Ky.1989). However, there is a strong distinction in Fourth Amendment jurisprudence between an automobile and a home. The mobility of an automobile creates an exigent circumstance *per se*. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (citing *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996)). By contrast, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585, 100 S.Ct. 1371 (quoting *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)).

We also note that, in some circumstances, the odor of

an illegal substance alone will create exigent circumstances justifying a warrantless search. This is particularly true where public safety is a concern. *See, e.g., Bishop v. Commonwealth*, 237 S.W.3d 567 (Ky.App.2007) (strong chemical smell consistent with production of methamphetamine created exigent circumstances based on public safety due to inherent dangers in methamphetamine production). However, such circumstances are not present in this case.

b. By knocking on the apartment door and announcing their presence, police created any resulting exigency

The odor of marijuana emanating from the left apartment did not create an exigency based on destruction of evidence. Therefore, the sounds police heard after knocking on the door provide the only possible justification for entry based on imminent destruction of evidence. There is certainly some question as to whether the sound of persons moving was sufficient to establish that evidence was being destroyed. However, we assume for the purpose of argument that exigent circumstances existed, and proceed to the more important question of whether police created their own exigency.

We agree with the well established principle that police may not rely on an exigent circumstance of their own creation. *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir.2005); *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir.1990); *see also United States v. Thompson*, 700 F.2d 944, 950 (5th Cir.1983) (citing cases so holding). But this general holding is rarely

dispositive, because "in some sense the police always create the exigent circumstances that justify warrantless entries and arrests." *Duchi*, 906 F.2d at 1284. Kentucky courts have not firmly addressed under what circumstances police may not rely on an exigency of their own creation. However, we draw guidance from other courts that have addressed the issue.

1. The proper test for a police-created exigency

In *United States v. Duchi*, the Eighth Circuit adopted an "antecedent inquiry," which focused on "the reasonableness and propriety of the investigative tactics that generated the exigency." 906 F.2d at 1284. The court went on to clarify that "bad faith is not required to run afoul of the standard we adopt and apply today." *Id.* The Third Circuit has used similar language, stating that "we must look to the reasonableness and propriety of [police] actions and investigative tactics preceding their warrantless entry." *United States v. Coles*, 437 F.3d 361, 370 (3d Cir.2006) (emphasis in original). Based on *Duchi* and other decisions of the Eighth Circuit, the Arkansas Supreme Court succinctly stated the proper test as being "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826, 834 (2004).

The Fifth Circuit employs a two-part test: "first whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement, and second, even if they did not do

so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement." *United States v. Gould*, 364 F.3d 578, 590 (5th Cir.2004).

The Sixth Circuit gives slightly more deference to law enforcement, requiring "*some showing* of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement." *Chambers*, 395 F.3d at 566 (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir.2002)) (emphasis added in *Chambers*). However, the Sixth Circuit seems to stop short of restricting created-exigency cases to those where the police acted in bad faith. *See Chambers*, 395 F.3d at 569.

The Second Circuit appears to give the most deference to law enforcement, holding that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir.1990) (en banc). "[T]he reasonableness of the police investigative tactics precipitating the exigency does not seem to figure into the Second Circuit's analysis." *Coles*, 437 F.3d at 369.

With the exception of the Second Circuit, these various approaches are similar, and will usually reach the same result. Even the Sixth Circuit's standard stops short of requiring bad faith on the part of police. In reviewing these approaches, we believe that a two-part test like that used by the Fifth Circuit, but including the language of the Arkansas Supreme Court, would provide the greatest clarity.

Therefore, for Kentucky, we adopt a two-part test. First, courts must determine "whether the officers

deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." *Gould*, 364 F.3d at 590. If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann*, 161 S.W.3d at 834. If so, then the exigent circumstances cannot justify the warrantless entry.

2. Application of the test

Turning to the facts of this case, it does not appear that the officers acted in bad faith. Though other officers were aware that the suspect had not entered the left apartment, Officer Cobb and the two narcotics detectives were not aware of this fact. Therefore, we cannot say that the officers acted deliberately with the bad faith intent to avoid the warrant requirement.

However, it was reasonably foreseeable that knocking on the apartment door and announcing "police," *after* having smelled marijuana emanating from the apartment, would create the exigent circumstance relied upon, i.e. destruction of evidence. It was reasonably foreseeable that, upon hearing police announce their presence, the persons inside the apartment would proceed to destroy evidence of their crime. Before police announced their presence, there would have been no reason to destroy evidence of either the marijuana which the officers had smelled, or evidence of the original drug transaction.

When the imminent destruction of evidence is a concern because a suspect has become aware of police presence, the primary distinction is the manner by which the suspect gained that knowledge. Where police are observing a suspect from a lawful vantage point, and the suspect sees police, then the exigency is generally not police-created. But where police unnecessarily announce their presence, and this creates the fear that evidence will be destroyed, police have created their own exigency, and cannot rely on the fear of evidence being destroyed as a justification for a warrantless entry. *See United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986) (agents created their own exigency by knocking on patio door after seeing marijuana in plain view through a window, where premises could have been covertly secured and warrant could have been obtained prior to approaching the patio); *see also United States v. Richard*, 994 F.2d 244, 249 (5th Cir. 1993) (agents created exigent circumstances by announcing presence).

The odor of marijuana did not create an exigency based on imminent destruction of evidence. In addition, any exigency that did arise when police knocked and announced their presence was police-created, and cannot be relied upon as a justification for a warrantless entry.

B. The "Good Faith" Exception Does Not Apply to a Warrantless Entry

Finally, the Commonwealth argues, consistent with the Court of Appeals' opinion, that although Officer Cobb was mistaken about the suspected drug dealer being in the left apartment, the "good faith" exception prevents the warrantless entry from being invalidated due to his

mistake. This argument is without merit.

We assume the Court of Appeals was referring to the good faith exception to the exclusionary rule established by *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). However, the *Leon* good faith exception is "clearly limited to warrants invalidated for lack of probable cause" and does not create a broad good faith exception for any illegal search. *United States v. Whiting*, 781 F.2d 692, 698 (9th Cir.1986). *See also United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir.1984) (refusing to extend the good faith exception to a warrantless search that the government argued was justified by exigent circumstances).[5]

[5] The Commonwealth's and the Court of Appeals' reliance on *Perkins v. Commonwealth*, 237 S.W.3d 215 (Ky.App.2007), is misplaced. The issue in *Perkins* was whether a search was consensual, and the *Perkins* court quoted *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990): "The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape." *Perkins*, 237 S.W.3d at 219 (quoting *Rodriguez*, 497 U.S. at 186, 110 S.Ct. 2793). To support the quoted language, *Rodriguez* cites *Archibald v. Mosel*, 677 F.2d 5 (1st Cir.1982), which stands only for the proposition that, when a warrantless entry is justified by exigent circumstances, the entry in

pursuit of a felon is not invalid simply because the police do not find the felon in the premises. In the case at bar, however, the warrantless entry was not justified by exigent circumstances.

III. CONCLUSION

While probable cause existed for police to obtain a warrant to enter the apartment occupied by King, police did not have proper exigent circumstances to justify a warrantless entry. Police were not in hot pursuit of a fleeing suspect. Further, the entry was not justified by imminent destruction of evidence. The odor of marijuana alone did not provide a justification, and any exigency arising from the sounds of movement inside the apartment was created by police, and therefore cannot be relied upon as a justification.

For the foregoing reasons, the judgment of the Court of Appeals is reversed. The denial of King's motion to suppress evidence is reversed, and King's judgment of conviction is vacated. The case is hereby remanded to Fayette Circuit Court for proceedings consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Noble, Scott, and Venters, JJ., concur. Cunningham, J., concurs in result only without separate opinion.

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OPPOSITION BRIEF

No. 09-1272

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Petitioner

v.

HOLLIS DESHAUN KING,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Commonwealth asks this Court to resolve legal issues that are not presented by this case. The Commonwealth's police-created exigency question presupposes that exigent circumstances existed. They did not. The odor of burnt marijuana and the sound of "people moving around" inside a dwelling do not support the factual inference that evidence is in the process of being destroyed. The Commonwealth's hot pursuit question likewise presupposes that the police entered King's apartment in pursuit of a felon. They did not. The whereabouts of a cocaine dealer on the lam played no role in the officers' decision to enter King's apartment. The Commonwealth distorts the record and creates the impression that this case presents a vehicle for resolving weighty constitutional questions. It does not. The questions this case does present are:

1. Should this Court disturb the lower court's factual finding that "the police were not in pursuit of a fleeing suspect" when they entered King's apartment in order to decide a question about the hot pursuit exception that is not applicable to this case and has not divided any of the federal appellate courts?

2. Should this Court ignore the fact that exigent circumstances never existed, either before or after the police knocked on King's apartment door and announced their presence, in order to issue an advisory opinion on the proper test for evaluating created-exigency cases?

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COUNTER STATEMENT OF THE CASE

The Commonwealth repeatedly misrepresents the factual record in order to create the erroneous impression that exigent circumstances justified the officers' warrantless entry into King's apartment. The Commonwealth claims that the police entered and searched King's home in pursuit of a cocaine dealer. Pet. at 2, 3. However, the lower courts specifically found that the officers did not know which apartment the cocaine dealer entered, and that the whereabouts of dealer played no role in their decision to enter King's apartment. Pet. App. at 3a, 5a, 6a, 8a, 36a. The Kentucky Supreme Court observed that the police "gave two reasons for the decision to enter [King's] apartment without a warrant: the fact that a crime was occurring based on the odor of marijuana, and the possible destruction of evidence based on the sound of movement inside the apartment." Pet. App. at 41a, 36a.

The Commonwealth also claims that the police announced themselves "three times." Pet. at 3. However, the record is devoid of any information about how many times the police knocked, or about how much time elapsed between when the officers announced their presence and when they entered the apartment.[1]

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[1] The Commonwealth distorts other facts, as well. In an attempt to create the appearance that the situation was urgent, the Commonwealth claims that the officers smelled *burning* marijuana. Pet. at 2. However, the trial court repeatedly found that the police smelled *burnt* marijuana, and the record is devoid of any evidence about the length of time that the odor of marijuana lingers in the air. Pet. App. at 3a, 4a, 6a, 8a. The Commonwealth claims that: "There were only two doors into which the felon could have fled." Pet. at 2. In actuality, four different apartments shared the breezeway in question, hence the repeated references to the *back* apartments. Pet. App. at 5a. The Commonwealth also erroneously suggests that King sold cocaine to the undercover officer. *See e.g.* Pet. at 31 ("Had the Respondent in this case made the sale in Virginia.... Respondent, however, did not make the sale in Virginia. He made it in Kentucky....") The cocaine dealer and King are not the same person. Pet. App. at 6a. Lastly, the Commonwealth notes that the search occurred on October 15, 2005. Pet. at 2. The search actually occurred on October 13, 2005. Pet. App. at 1a, 2a, 34a.

The facts as found by the trial court, and reiterated by the Kentucky Supreme Court, are as follows. A drug dealer sold crack cocaine to an undercover police officer. Pet. App. at 2a, 35a. That undercover officer radioed to several stand-by officers that the cocaine dealer entered the back *right* apartment of an apartment complex. *Id.* The stand-by officers heard only a part of the radio broadcast. They did not hear (and did not independently know) which apartment the cocaine dealer entered. *Id.* As the stand-by officers proceeded down the breezeway of the apartment complex, they heard a door slam. *Id.* Their attention was then diverted by the odor of burnt marijuana, which they believed emanated from the back *left* apartment. *Id.* One of the stand-by officers knocked on the back left apartment door and identified himself as a police officer. *Id.* at 3a-4a, 36a. In response, the officers heard "people moving around" inside. *Id.* at 4a, 43a. The stand-by officers kicked in the door and searched the apartment. *Id.* at 4a, 36a. They found drugs, drug paraphernalia, and $2,500.00 in cash. *Id.* at 4a-5a, 36a. Eventually, the officers realized their mistake, entered the back *right* apartment, and arrested the cocaine dealer. *Id.* at 6a, 36a. King lives in the back *left* apartment. *Id.* at 6a-7a, 37a.

REASONS FOR DENYING THE WRIT

I. This Court should not disturb the lower court's factual finding that "the police were not in hot pursuit of a fleeing felon" in order to decide a question about the hot pursuit exception that has not divided the Courts of Appeal.

This case does not provide a vehicle for this Court to resolve the Commonwealth's hot pursuit question because, as the lower court found, the police did not enter King's apartment in pursuit of the cocaine dealer. Moreover, following this Court's instruction, every federal appellate court applies the same "totality of the circumstances" test to determine whether exigent circumstances exist. Whether the suspect is aware the he is being pursued is only one factor that courts consider when determining whether the hot pursuit exception applies.

A. Because the police were not in pursuit of a fleeing felon when they entered King's apartment, the hot pursuit question presented by the Commonwealth calls for an advisory opinion from this Court.

This is not a hot pursuit case. Because the police were not in hot pursuit of a fleeing suspect when they kicked in the door to King's apartment, the hot pursuit question presented by the Commonwealth – but not actually presented by the facts of this case – is purely academic. This Court should decline the Commonwealth's invitation to issue an advisory opinion. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-46 (1936) (refusing to render an advisory opinion.)

The Commonwealth's hot pursuit question presumes that the police were pursuing a fleeing felon when they entered King's apartment. They were not. The stand-by officers entered the breezeway in pursuit of the cocaine dealer, but their

attention was diverted once they detected the odor of burnt marijuana emanating from King's apartment. The Kentucky Supreme Court explained that two things motivated the officers' decision to kick in the door of King's apartment; the whereabouts of the cocaine dealer was not one of them:

> As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Pet. App. at 36a.

The second sentence of the Kentucky Supreme Court's opinion begins: "We hold that the police were not in hot pursuit of a fleeing suspect...." Pet. App. at 34a. And, the court rejected the applicability of the hot pursuit exception in the section of its opinion titled: "The Police Were Not In Hot Pursuit of a Fleeing Suspect." Pet. App. at 40a.

The Kentucky Supreme Court reviewed the record and concluded that the trial court's findings of fact "were supported by substantial evidence, and are therefore conclusive." Pet. App. at 38a. This Court should defer to those findings. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue.")

B. The Courts of Appeal apply the same "totality of the circumstances" test to determine whether exigent circumstances exist and the hot pursuit question applies.

The *amici* states urge this Court "to take this case to set forth a uniform national standard for analyzing exigent circumstances." Am. Pet. at 2. This Court has already done that. In *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006), this Court granted *certiorari* to resolve the "differences among state courts and the Courts of Appeals concerning the appropriate standard governing warrantless entry by law enforcement in an emergency situation." *Id.* at 402. This Court instructed that police action is "reasonable" under the Fourth Amendment "regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action." *Id.* at 404 (internal citation omitted).

The Commonwealth urges this Court to grant *certiorari* and decide whether the hot pursuit exception applies "only if the government can prove that the suspect was aware that he was being pursued." Pet. at 28. Again, this Court's existing case law already answers that question. No single fact, *e.g.* the suspect's awareness of his or her pursuit, controls the applicability of the hot pursuit exception; this Court has "consistently eschewed bright-line rules" in favor of a "totality of the circumstances test." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

In accordance with *Brigham City* and *Robinette*, all of the Courts of Appeal employ a "totality of the circumstances" test to determine whether exigent

circumstances, including the pursuit of a fleeing felon, justify a warrantless search.[2] A suspect's knowledge of his or her pursuit is just one factor that courts consider when determining whether the hot pursuit exception applies.

As recently as four years ago, this Court employed the "totality of the circumstances" to determine whether exigent circumstances authorized the *Brigham City* officers to conduct a warrantless search. *See Brigham City*, 547 U.S. at 406 ("We think the officers' entry here was plainly reasonable under the circumstances.") All of the Courts of Appeal utilize the "totality of the circumstances" test without difficulty or division, and that approach fully answers the Commonwealth's hot pursuit question. This Court should not disturb the lower court's factual finding that the police did not enter King's apartment in pursuit of a

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[2] *See Dorman v. United States*, 435 F.2d 385, 392 (D.C. Cir. 1970) (en banc) (articulating a non-exhaustive list of factors for a reviewing court to consider when determining whether exigent circumstances exist, recognizing "the numerous and varied street fact situations do not permit a comprehensive catalog" of when it is objectively reasonable to conclude that exigent circumstances were present); *United States v. Adams*, 621 F.2d 41, 44 (1st Cir. 1980) ("the *Dorman* approach has value," but "it is not to be used...as a pass or fail checklist for determining exigency."); *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990) (the test to determine whether exigent circumstances exist "is an objective one that turns on...the totality of the circumstances confronting law enforcement agents in the particular case."); *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (identifying a list of circumstances "which have seemed relevant to courts" when ascertaining whether exigent circumstances existed, again recognizing that "emergency circumstances will vary from case to case, and the inherent necessities of the situation at the time must be scrutinized."); *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970) (following *Dorman*); *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (following *Rubin*); *United States v. Howard*, 106 F.3d 70, 77 (5th Cir. 1997) ("We must look to the totality of the circumstances and for both direct and circumstantial evidence of exigency."); *United States v. Shye*, 492 F.2d 886, 891-92 (6th Cir. 1974) (following Dorman); *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998) ("Looking at the totality of the circumstances in this case...exigent circumstances existed."); *Creighton v. Anderson*, 922 F.2d 443, 447-48 (8th Cir. 1990) (following *Dorman*); *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008) ("Considering the totality of the circumstances, law enforcement must have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm."); *United States v. Anderson*, 154 F.3d 1225, 1233 (10th Cir. 1998) (there "is no absolute test for determining whether exigent circumstances are present because such a determination ultimately depends on the unique facts of each controversy."); *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir. 1987) (per curiam) (following *Dorman*).

fleeing felon in order to decide a well-worn issue that has not divided any of the Courts of Appeal.

C. The fact that one state's intermediate appellate court has issued a single opinion in disagreement with the Kentucky Supreme Court, the Georgia Supreme Court, and the "totality of the circumstances" approach employed by all of the Courts of Appeal does not merit this Court's attention.

The Commonwealth's argument for why this Court should grant *certiorari* on the hot pursuit question is unconvincing. The Commonwealth does not identify a disagreement among the federal appellate courts because one does not exist. Instead, the Commonwealth identifies a single opinion from Virginia's intermediate appellate court and argues that it is an outlier.

The fact that one state's intermediate appellate court has, on one occasion, has "taken a completely different approach" than the Kentucky Supreme Court, the Georgia Supreme Court, and the "totality of the circumstances" approach employed by every federal appellate court does not merit this Court's attention. *See e.g. Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system...we must occasionally perform a pure error-correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land.") A single conflicting opinion from one state's intermediate appellate court hardly constitutes a "divergent application of the hot pursuit exception...across the many jurisdictions of the United States." Pet. at 31.

II. The Commonwealth's police-created exigency question calls for an advisory opinion from this Court.

King prevails regardless of which police-created exigency test this Court employs. What the police did (or did not do) before they entered King's apartment has no bearing on the outcome of this case. The Commonwealth's bold claim that it would have won had the case been litigated in the First, Second, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits is mistaken. Pet. at 10. Because no exigency ever existed, the officers' warrantless entry into King's apartment was at all times unlawful.

Every police-created exigency case necessarily presents two questions: (1) did an exigent circumstance exist and, if so (2) did the police impermissibly "create" the exigent circumstance? To avoid issuing an advisory opinion, it is axiomatic that a court must answer the first question in the affirmative before proceeding to the second question. Plainly, the police cannot be said to have "created" an emergency if no emergency existed. In the instant case, the Commonwealth would lose in every federal appellate court on the first question.

No emergency existed here. The odor of burnt marijuana emanating from King's apartment plus the nondescript and unremarkable sound of "people moving around" inside does not support the factual inference that the occupants might destroy crime evidence. In fact, this Court has already held that the odor of burning drugs and the sound of "shuffling or noise" from within a private dwelling does not support the factual inference that the occupant(s) might destroy evidence. The

Commonwealth does not ask this Court to revisit that conclusion, and there is no need for this Court to do so.

In *Johnson v. United States*, 333 U.S. 10 (1948), the police received a tip that unknown persons were smoking opium in a hotel room, and they immediately smelled the "distinctive and unmistakable" odor of burning opium emanating from Room 1. The officers knocked on the door "and a voice inside asked who was there." One of the officers identified himself as "Lieutenant Belland." After "a slight delay" and some "shuffling or noise" in the room, the defendant opened the door and "acquiescently" admitted the officers. Belland told the defendant that he wanted to talk to her about the opium smell. She denied that there was such a smell, and Belland arrested her and searched the room. The defendant moved to suppress the "incriminating opium and smoking apparatus" discovered in the search. The District Court denied the motion and the Ninth Circuit affirmed. *Id.* at 12.

This Court reversed. This Court noted that the odor of burning opium might have supplied the probable cause necessary for the issuance of a search warrant. *Id.* at 13. But, this Court concluded that the officers' unlawfully entered the apartment without a warrant. This Court explained:

> No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a moveable vehicle. *No evidence or contraband was threatened with removal or destruction*, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

> If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

Id. at 15; emphasis added; *see also Taylor v. United States*, 286 U.S. 1, 6 (1932) ("Prohibition officers may rely on a distinctive odor [of whiskey] as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties...against unreasonable search.")

Johnson remains good law, and its reasoning is sound. If the odor of burning – or in this case "burnt" – drugs were enough to supply both the probable cause *and* exigent circumstances necessary to effectuate a warrantless entry into a person's home, then the Warrants Clause would be devoid of all meaning. Ex ante, the government could justify a warrantless search simply by presenting evidence that the officer in question was qualified to detect the odor of narcotics. Nothing more would be required. The potential for abuse and pretextual searches would be intolerably high.[3]

Moreover, the sound of "shuffling or noise" – or in this case, "people moving around" – in response to a knock on the door by the police does not supply any additional information about what a person may (or may not) be doing inside his home. Not surprisingly, this Court *presumes* that "movement" will follow an

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[3] At the suppression hearing in the instant case, the stand-by officer who knocked down the door to King's apartment was asked about his hunch that the "people moving around" inside King's apartment were destroying evidence. The officer was asked whether, upon entry, he found any evidence consistent with the destruction of evidence. The officer testified that he thought items on the coffee table in the middle of the room "looked like they had been recently moved" because "a baggie" was "in proximity" to a picture frame. In apparent recognition of the absurdity of his own testimony, the officer then "candidly admitted that there is no legal obligation for occupants of these apartments or any other residence or dwelling unit to open the door to a knock and demand from law enforcement officers" and he "candidly admitted that people move inside apartments without being involved in illegal criminal activity." Pet. App. at 6a.

officer's knock at the door. *See e.g. Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (the knock-and-announce rule "assures the opportunity to collect oneself before opening the door"); *Richards v. Wisconsin*, 520 U.S. 385, 393 n. 5 (1997) ("[W]hen police enter a residence without announcing their presence, the residents are not given an opportunity to prepare themselves.... ... The brief interlude between announcement and entry...may be the opportunity that an individual has to pull on clothes or get out of bed.")

If this Court finds that exigent circumstances existed here, then any time the police have probable cause to believe that the occupants of a private dwelling are consuming drugs they may breach the threshold. Any person who answers (or attempts to answer) the door and assert his Fourth Amendment rights will have engaged in the exact behavior, *i.e.* "moving around," found to justify a warrantless entry. That hardly comports with this Court's admonishment that there is no *per se* exigency rule in drug cases.[4] *See United States v. Karo*, 468 U.S. 705, 717 (1984) (people suspected of drug offenses are protected by the Warrants Clause to the same degree as people suspected of nondrug offenses).

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[4] There is a *per se* exigency rule in automobile cases. Motorists suspected of possessing narcotics are not entitled to the same degree of Fourth Amendment protection as the occupants of a home. *See Maryland v. Dyson*, 527 U.S. 465, 467 (1999) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits the police to search the vehicle without more.") Moreover, several courts have held that exigent circumstance arise when the police detect odors associated with the highly dangerous process of methamphetamine manufacturing. *See e.g. United States v. Clarke*, 564 F.3d 949, 959 (8th Cir. 2009); *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996). Unlike methamphetamine manufacturing, however, the consumption of marijuana within one's home does not present any immediate or inherent threat to public safety (as evinced by the fact that Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon, have all decriminalized the possession of a small quantity of marijuana.)

Moreover, this Court has unanimously rejected the notion that every drug investigation presents the potential risk that persons will destroy of evidence. In *Richards*, this Court was asked to adopt a blanket exception to the knock-and-announce requirement for drug investigations on the theory that such investigations frequently present a threat of violence or the potential destruction of evidence. *Richards*, 520 U.S. at 388. This Court noted that although "felony drug investigations may frequently involve both these circumstances," creating exceptions "based on the 'culture' surrounding a general category of criminal behavior presents at least two serious concerns." *Id.* at 392. The first concern is that such an exception "contains considerable overgeneralization." *Id.* at 393. This Court recognized that "while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree." *Id.* at 393. The second concern "with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others." *Id.* at 393-94. This Court noted that armed "bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence...the Fourth Amendment's reasonableness requirement would be meaningless." *Id.* at 394.

Both those concerns are present in this case. This case involves the investigation of a misdemeanor drug offense, *i.e.* the one time possession of a so-called personal-use quantity of marijuana.[5] The only evidence plausibly threatened with destruction was any paraphernalia associated with marijuana consumption and whatever might remain of an unused portion of that drug. As of this brief filing date, possession of drug paraphernalia and drug residue are also both considered misdemeanor offenses in Kentucky.[6] Prior to their entry, the stand-by officers knew nothing about the occupant(s) of King's apartment, including whether they had a penchant for drug possession, drug trafficking, violence, weapons possession, the destruction of evidence, etc. If this Court were to permit a warrantless entry on the basis of exigent circumstances in King's case then, as *Richards* predicts, any limiting principle will be impossible to discern.

Not surprisingly, in light of *Johnson* and *Richards*, no Court of Appeals has held that the odor of burning marijuana coupled with the nondescript sound of "movement" inside a home constitutes exigent circumstances. *See United States v. Mowatt*, 513 F.3d 395, 397, 400-02 (4th Cir. 2008) (the odor of marijuana and "movement on the inside of the apartment confirming that somebody was walking

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[5] In Kentucky, the consumption of illegal substances is not a crime. *See Nethercutt v. Commonwealth*, 43 S.W.3d 330 (Ky. App. 1931) (A prohibition era case, in which the "Attorney General very frankly admits that liquor in one's stomach does not constitute possession within the meaning of the law"). Marijuana possession, however, is a Class A misdemeanor offense. *See* Ky. Rev. Stat. 218A.1422(2) (so stating).

[6] In Kentucky, the possession of drug paraphernalia is a Class A misdemeanor for the first offense and a Class D felony for subsequent offenses. *See* Ky. Rev. Stat. 218A.500(5). As of this brief filing date, the Kentucky Supreme Court is considering whether the possession of drug residue constitutes a crime at all. *See Finn v. Commonwealth*, 2008-SC-749-DG (submitted for consideration following oral argument on April 16, 2010).

around" did not evince exigent circumstances); *United States v. Collins*, 510 F.3d 697, 700-01 (7th Cir. 2007) (the suspicion of cocaine trafficking, a person in the house observing that "the police are at the door," and "a sound of movement not further defined" does not support the inference that evidence "was being, or was about to be, destroyed."); *United States v. Timberlake*, 896 F.2d 592, 597-98 (D.C. Cir. 1990) (the odor of PCP alone, without anything in the record to suggest "that the officers heard anything on the other side of the apartment door indicating that its occupants were destroying or about to destroy evidence," does not give rise to an "exigent circumstance justifying the warrantless entry."); *compare United States v. Carr*, 939 F.2d 1442, 1447-49 (10th Cir. 1991) (the strong odor of PCP emanating from a motel room, the fact that an occupant "slammed the door shut, locked it, and shouted to another individual inside the motel room that the police were inside," followed by "commotion, shuffling and movement inside the motel room," and the sound of a toilet flushing, constituted exigent circumstances). The Commonwealth's assertion that it would have prevailed in most of the Courts of Appeals is wrong. Pet. at 10. The Commonwealth loses before any court reaches the created-exigency stage of the analysis.

The Commonwealth makes no attempt to distinguish *Johnson* or *Richards* or to argue that either case was wrongly decided. The Commonwealth simply ignores *Johnson* and *Richards* altogether. The Commonwealth has wisely chosen not to renew its former argument that the odor of marijuana emanating from an

apartment and the sound of "people moving around" inside support the factual inference that someone might destroy evidence.[7]

The Commonwealth would have this Court simply assume – as the Kentucky Supreme Court did – that exigent circumstances existed.[8] This Court should reject that approach. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (the lower court's "failure to assess whether exigent circumstances were present in this case violated *Payton v. New York*, 445 U.S. 573, 590 (1980)).") (full citation to *Payton* added).

In sum, in accordance with *Johnson* and *Richards*, exigent circumstances never existed, either before or after the police knocked on the door to King's apartment and announced their presence. As this Court's own case law already strongly suggests, the warrantless entry into King's apartment was at all times unlawful. The Courts of Appeal are not "deeply divided" on the issue of whether the odor of burnt marijuana emanating from an apartment and the sound of "people moving around" inside constitutes exigent circumstances. No federal appellate court has held that they do. King prevails regardless of which police-created

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[7] To the extent that it makes an argument at all, the Commonwealth's implicit contention that exigent circumstances existed is based entirely on its specious claim that in addition to the odor of burning marijuana and the sound of "people moving around," the police also entered King's apartment in pursuit of the cocaine dealer. Pet. at i, 2-3, 21. As discussed *supra*, that claim is factually inaccurate. The Kentucky Supreme Court found that only two facts motivated the stand-by officers' decision to enter King's apartment: "the fact that a crime was occurring based on the odor of marijuana, and the possible destruction of evidence based on the sound of movement inside the apartment." Pet. App. at 41a.

[8] The Kentucky Supreme Court cited to *Johnson*, acknowledged that "[o]dor alone is generally an insufficient basis for the warrantless search of a home based on imminent destruction of evidence," and commented that "[t]here is certainly some question as to whether the sound of persons moving was sufficient to establish that evidence was being destroyed." Pet. App. at 41a-43. However, the court then assumed *arguendo* that exigent circumstances existed in order to "proceed to the more important question of whether police created their own exigency." *Id.* at 43a.

exigency test this Court articulates because the analysis need not (and should not) advance that far. The Commonwealth asks this Court to resolve a purely academic question, which is not presented here. To the extent that this Court is interested in addressing the question of police-created exigencies, it should wait for a different case to do so.

III. The Commonwealth exaggerates the division between the Courts of Appeal in order to create the false impression that the courts are "irreconcilably split."

Only four Courts of Appeal – the Second, Third, Fifth, and Eighth Circuits – have expressly identified a test or methodology for evaluating whether the police have "created" or "manufactured" exigent circumstances. The remaining Courts of Appeal have yet to articulate or consistently apply a test in created-exigency cases.

The Fifth and Third Circuits employ the same test. That test "involves two levels of inquiry, first whether the officers deliberately created the exigent circumstances with bad faith intent to avoid the warrant requirement, and second, even if they did not do so in bad faith, whether their actions creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement." *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004); *see also United States v. Coles*, 437 F.3d 361 (3d Cir. 2006) (analyzing, then adopting, the Fifth Circuit's test for evaluating police-created exigency questions).

The Second Circuit employs a different test. The Second Circuit does not consider whether the officers acted in bad faith. Instead, as long as "law enforcement agents act in an entirely lawful manner, they do not impermissibly

create exigent circumstances." *United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990).

The Eighth Circuit inquires "into the appropriateness of investigative tactics as the principled way to evaluate whether the officers created the exigent situation" without regard to whether the police acted in bad faith (because "the danger to constitutional rights more often comes from 'zealous officers' rather than faithless ones.") *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990); *see also United States v. Cisneros-Guiterrez*, 598 F.3d 997, 1005 (8th Cir. 2010) ("We must determine the reasonableness and propriety of the investigative tactics that generated the exigency.") The court pays particular attention to whether the police "foreseeably increase the likelihood of the destruction of evidence." *Cisneros-Guiterrez*, 598 F.3d at 1006.

King agrees with the Commonwealth's characterization of the tests adopted by the Second, Third, Fifth, and Eighth Circuits. But, none of the other Courts of Appeals have articulated a "test" or methodology for evaluating created-exigency cases, which they have applied uniformly or consistently to multiple cases.

According to the Commonwealth, the First and Seventh Circuits consider whether the police have "unreasonably or purposefully delayed in obtaining a warrant." Pet. at 11. But, this "test" pertains to whether exigent circumstances exist, not whether the police have impermissibly "created" them. This Court has instructed that if the police have the opportunity to obtain a warrant, then no true exigency exists. *See Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (because, *inter*

alia, "there is no suggestion that a search warrant could not easily and conveniently have been obtained," no exigent circumstances existed.)

The Commonwealth also contends that the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits consider "whether there has been an unreasonable or purposeful delay in obtaining a warrant. These circuits, however, will not find that police have impermissibly created the resulting exigent circumstances without a finding of 'deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement.'" Pet. at 13 (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002). However, the Commonwealth misreads *Ewolski*. In that case, the Sixth Circuit cited one of its own cases and a single case from the Ninth Circuit, and observed, generally and in *dictum*, that "the created-exigency cases have typically required some showing of deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement." *Id.* at 504. Such an observation hardly constitutes the articulation of a test. With regard to the other courts, the Commonwealth simply pulls an isolated sentence from one opinion in each circuit and erroneously claims that it represents that court's "test."

The Commonwealth likewise misreads the Fourth Circuit's case law. The Commonwealth claims that the Fourth Circuit considers whether "the exigent results of the police officers' actions were reasonably foreseeable." Pet. at 16. In support, it cites to *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008). But, in that case, the court held that the odor of marijuana emanating from an apartment and "movement on the inside of the apartment confirming that somebody was

walking around" did not constitute exigent circumstances. *Id.* at 400-01 ("To have authority to make a warrantless search, the officers needed exigent circumstances, and *Johnson* tells us they were not present in this case.") *Mowatt* is not a created-exigency case.

At any rate, even assuming for the sake of argument every federal appellate court has articulated the created-exigency test identified by the Commonwealth, any differences between the tests do not merit this Court's attention. Because the ultimate touchstone of the Fourth Amendment is "reasonableness" – itself a fact-intensive, somewhat amorphous concept – each of the created-exigency tests is likewise fact-dependent and flexible. The various tests either state the obvious or rely on a "reasonableness" standard or both. All of the tests are breathtakingly broad and tautological in nature. Again, the tests are:

- Regardless of whether the police acted in bad faith, the police impermissibly create exigent circumstances when their actions were "**sufficiently unreasonable or improper**." (Third and Fifth Circuits).

- The police do not impermissibly create exigent circumstances when they "act in an **entirely lawful manner**." (Second Circuit).

- The "principled way to evaluate whether the officers created the exigent situation" is to inquire "into the **appropriateness of investigative tactics**." (Eighth Circuit).

- The police impermissibly create exigency circumstances whey they "**unreasonably** or purposefully delay obtaining a warrant." (First and Seventh Circuits).

- The police impermissibly create exigent circumstances when they "**unreasonably** or purposefully delay in obtaining a warrant" and when they intentionally evade the warrant requirement. (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits).

- The police impermissibly create exigent circumstances when "the exigent results of the police officers' actions were **reasonably** foreseeable." (Fourth Circuit).

Who could plausibly disagree with any of those statements? More to the point, what exactly is the difference between inquiring whether the police acted in a "sufficiently unreasonable" manner (Third and Fifth Circuits), or in an "entirely lawful manner" (Second Circuit), or in an "appropriate" manner (Eighth Circuit), or "unreasonably" (First, Sixth, Seventh, Ninth, Tenth, Eleventh, D.C. Circuits), or whether the results of their actions were "reasonably" foreseeable (Fourth Circuit)? Neither the *amici* states nor the Commonwealth provides an answer.

The Commonwealth complains that there is an "irreconcilable split" among the Courts of Appeal, but it is difficult to discern any true difference between the applications or outcomes of *any* of the tests ascribed to the courts by the Commonwealth. For example, it is difficult to conceive of how the outcome of a case would depend on whether it was litigated in the First and Seventh Circuits as opposed to the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits. According to the Commonwealth, the First and Seventh Circuits consider whether the police have "unreasonably" delayed in obtaining a warrant, whereas the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits consider whether the police have "unreasonably" delayed in obtaining a warrant *and* whether the police have attempted "to evade the warrant requirement." By definition, "evasion" of the warrant requirement is "unreasonable." One would expect the same result to follow in all of those courts. *Cf. United States v. McGregor*, 31 F.3d 1067, 1070 n. 2 (11th Cir. 1994) (doubting

that the outcome of a created-exigency case would be different in the Eighth and Eleventh Circuits).

The Commonwealth boldly claims that "[d]epending on which circuit or state this case was litigated in, different results would be reached." Pet. at 20. Remarkably, however, both the Commonwealth and the *amici* states fail to cite to any cases where different circuits have reached disparate conclusions when presented with similar fact patterns.

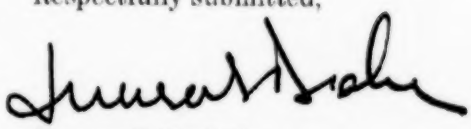
The Commonwealth asks this Court to articulate a bright-line rule for determining whether, and when, the exigent circumstances exception to the warrant requirement applies when police "create" the exigency. Pet. at 9. All of the federal appellate courts follow this Court's instruction and use "reasonableness," broadly defined, as the touchstone for evaluating created-exigency cases. They are not in need of further guidance from this Court.

In sum, this is not a created-exigency case. The odor of marijuana emanating from an apartment, coupled with the sound of "people moving around" inside does not support the factual inference that evidence might be destroyed. Because exigent circumstances never existed, the officers' warrantless entry into King's apartment was, at all times, unlawful. The Commonwealth's created-exigency question impermissibly calls for an advisory opinion from this Court. This case is not the proper vehicle for deciding created-exigency questions.

CONCLUSION

For the reasons discussed herein, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,



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MOTION

MOTION FILED

OCT 28 2010

No. 09-1272

In The

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENT'S MOTION TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED

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RESPONDENT'S MOTION TO DISMISS THE PETITION AS IMPROVIDENTLY GRANTED

On September 27, 2010, this Court granted the Commonwealth's Petition for Writ of Certiorari to the Kentucky Supreme Court. Since that time, Counsel for Respondent has become aware of proceedings in this case in the state trial court that rendered the case moot before the Commonwealth's Petition for Certiorari was filed on April 19, 2010. Upon learning of these proceedings, Counsel for Respondent immediately contacted Counsel for Petitioner, who then initiated additional litigation in state court. Counsel for Respondent promptly notified the Clerk of this Court about that litigation. Counsel now moves this Court to dismiss the Petition as improvidently granted.

The following events occurred in this case, both before and after the Commonwealth filed its Petition for Certiorari:

1. On January 21, 2010, the Kentucky Supreme Court vacated Respondent's conviction. *King v. Commonwealth*, 302 S.W.3d 649 (2010). However, the Commonwealth did not seek a stay of the court's mandate and, as a result, the case was remanded to the Fayette Circuit Court "for further proceedings consistent with" the Kentucky Supreme Court's opinion. *Id.* at 657.

2. On March 4, 2010, the Commonwealth moved to dismiss the charges against Respondent in Fayette Circuit Court. Appendix at 1, 15, 17. The Fayette Circuit Court held a hearing on how to

proceed in the case entered against Respondent. Regarding the possibility of further prosecution, the trial judge asked the prosecutor whether, "once all this evidence inside the apartment is suppressed . . . is there anything more to move forward with by the Commonwealth?" The prosecutor replied: "No, that's why we move to dismiss it, Judge." Appendix at 17. The prosecutor's representation that the Commonwealth had no admissible evidence against King prompted the trial court to dismiss the charges with prejudice.

The trial court explained: "I understand the Commonwealth's position – I think that in this case, when there's really not anything else that I don't think can come up, I'm going to dismiss the charges . . . ." Appendix at 17; *see also* Appendix at 42. ("It is undisputed that the Fayette Commonwealth's Attorney's Office has represented to this Court, both at the hearing after Remand from the Kentucky Supreme Court and in oral arguments on this Motion, that it would have no evidence to support any charges against King that was not the subject of the Kentucky Supreme Court's Reversal and Remand. . . .")

4. The Commonwealth did not appeal the order dismissing the case with prejudice.

5. The Commonwealth filed its Petition for Certiorari in this Court on April 19, 2010. The Commonwealth's Petition for Certiorari did not mention that all of the charges against Respondent had been previously dismissed with prejudice on March 8, 2010.

6. Counsel for Respondent filed her Brief in Opposition before this Court to the Commonwealth's Petition for Certiorari on August 24, 2010. At that time, however, Counsel for Respondent was unaware of the dismissal of the charges against Respondent that occurred in the Fayette Circuit Court. As a result, the Brief in Opposition did not discuss the dismissal of the charges against Respondent.[1]

7. On September 27, 2010, this Court granted the Commonwealth's Petition for Certiorari. Seven days later, on October 4, 2010, after the Court granted the Petition, Counsel for Respondent learned that the charges against Respondent had been dismissed with prejudice months earlier, before the Petition for Certiorari had been filed. Counsel for Respondent immediately contacted Counsel for Petitioner, who then initiated litigation in state court. By letter

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[1] Undersigned counsel deeply regrets this oversight, and she apologizes for the added work that her lapse has caused this Court. While the case was on remand to the Fayette Circuit Court, the presiding judge assembled the local prosecutor and King's former trial attorney, who is not employed by the Department of Public Advocacy. Although undersigned counsel was counsel of record for King at the time, she was not notified of the hearing or copied on the Order dismissing the case with prejudice. After this Court granted review, King's former trial attorney contacted undersigned counsel and notified her of that Order. Undersigned counsel immediately contacted counsel of record for the Commonwealth and wrote to the Clerk of this Court informing him of the Order, the Commonwealth's motion to "rescind" the Order, and of King's intent to file this Motion to Dismiss.

dated October 12, 2010, Counsel for Respondent promptly notified the Clerk of this Court of this ongoing litigation. Appendix at 27.

8. On October 8, 2010, the Commonwealth filed a motion in Fayette Circuit Court asking that court to "rescind" the Order dismissing the case with prejudice. In support of its motion, the Commonwealth told the court that if it did not rescind the Order, it "could forever prevent review of this case by the Supreme Court of the United States." Appendix at 10.

9. On October 19, 2010, the Fayette Circuit Court issued an opinion, which provided in part:

> The dilemma in which the Attorney General now finds itself was of its own making, i.e. not letting any Counsel of Record, the Fayette Commonwealth's Attorney's Office or this Court know that it was contemplating, drafting or filing a Petition for Writ of *Certiorari* with the United States Supreme Court. That is undisputed and confirmed by Counsel at the oral arguments on October 8, 2010.

Appendix at 43.

Nevertheless, the Fayette Circuit Court entered an Amended Order which provided that "this case is now Dismissed Without Prejudice as of March 8, 2010." Appendix at 46. Respondent has appealed that Amended Order to the Kentucky Court of Appeals and, if necessary, he will seek discretionary review to the Kentucky Supreme Court. It is possible, but

unlikely, that the appeal will be resolved by the end of this Term.

10. On October 22, 2010, Counsel for Respondent filed a Notice of State Court Proceedings to alert this Court to the Fayette Circuit Court's Amended Order. Appendix at 48.

Counsel for Respondent respectfully submits that the developments in the Fayette Circuit Court justify this Court dismissing the Petition as improvidently granted. That is true for three reasons. First, the Court lacks Article III jurisdiction because the case is moot and there is no case or controversy pending in this case. Second, Double Jeopardy has attached and bars further proceedings in this case. Third, even if this Court concludes that Double Jeopardy has not attached and a case or controversy exists, the case nonetheless should be dismissed on ripeness grounds.

The first reason to dismiss the Petition is that there is no case or controversy pending against Respondent. The case is moot. The charges against Respondent were dismissed. No charges are pending. Because there are no charges pending against Respondent, there is no case or controversy and therefore the federal courts have no power to adjudicate the case under Article III. Any opinion in this case would be an advisory opinion. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 621 n. 1 (1989) ("In the absence of any live case or controversy, we lack jurisdiction and thus also the power to disturb the state

court's judgment."); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). A federal court may not "decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A litigant must have suffered, or be threatened with, an actual injury that is likely to be redressed by a favorable judicial decision. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

Second, further proceedings in this case are barred by the Double Jeopardy Clause. The Fayette Circuit Court's order of dismissal constitutes an acquittal for double jeopardy purposes. The order reflects the court's finding that the Commonwealth – by its own admission – was unable to prove its case against King. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1997) (If "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged" then the ruling meets the definition of "acquittal" for double jeopardy purposes.); *accord Smith v. Massachusetts*, 543 U.S. 462, 467-68 (2005). This ruling bars the Commonwealth from prosecuting King in the event that it prevails on appeal and the case is remanded by this Court.[2] *See Ball v. United States*, 163 U.S. 662, 671

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[2] In *Martin Linen Supply Co.*, this Court explained that "a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable by the United States because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed." 430 U.S. at 570. The procedural posture of this case is distinguishable.

(Continued on following page)

(1896) (a verdict of acquittal may not be reviewed without putting a defendant twice in jeopardy).

Third, even if this Court concludes that there is an Article III case or controversy and that Double Jeopardy does not bar further proceedings, the Petition should nonetheless be dismissed on ripeness grounds. Ripeness is a prudential doctrine that requires the Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The issues in this case are not fit for judicial decision because there is no actual case pending against Respondent. Further, there is no hardship to the parties of withholding court consideration. Even assuming that the Commonwealth still has the constitutional authority to bring charges once again in state court – a claim Respondent denies – the only hardship to the Commonwealth in dismissing this case at the present time is in delaying the Commonwealth's opportunity to re-litigate the case it lost in the Kentucky Supreme Court.

Here, the automatic restoration of King's conditional guilty plea, which has been withdrawn, would not result; rather, the opportunity for a new trial would result because the Kentucky Supreme Court has vacated King's convictions.

For the foregoing reasons, this Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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**Counsel of Record for*
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APPENDIX

March 8, 2010 Order dismissing case "with prejudice" ..... App. 1

Petitioner's motion to "rescind" the March 8, 2010 Order ..... App. 3

Respondent's Reply to Petitioner's motion ..... App. 13

Respondent's letter to General Suter ..... App. 27

Petitioner's Reply in support of its motion ..... App. 29

Respondent's Response to Petitioner's Reply .... App. 36

October 19, 2010 Opinion of the Fayette Circuit Court ..... App. 41

October 19, 2010 Amended Order dismissing the case "without prejudice" ..... App. 46

Respondent's Notice of State Court Proceedings ..... App. 48

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY	PLAINTIFF
VS.	NO. 05-CR-1500-2
HOLLIS DESHAUN KING	DEFENDANT

ORDER

(Filed Mar. 8, 2010)

* * * * * * *

Based upon the Remand from the Kentucky Supreme Court, it is ORDERED that the Defendant's Motion to Suppress is hereby SUSTAINED.

The Commonwealth made a Motion to Dismiss the case without prejudice over the objection of the Defendant to the case being dismissed without prejudice. The Court having heard arguments of Counsel and being otherwise sufficiently advised; IT IS ORDERED that the case shall be Dismissed With Prejudice.

Dated this the 8th day of March, 2010.

/s/ James D. Ishmael
HON. JAMES D. ISHMAEL, JR.

ATTESTED COPIES TO:

Hon. Matthew Boyd
Commonwealth Attorney
Department of Corrections
Probation & Parole

This the 8 day of March, 2010

WILMA F. LYNCH, C.F.C.C.
By: /s/ K. Ashcroft D.C.

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION
No. 05-CR-1500-2

COMMONWEALTH OF KENTUCKY — PETITIONER

vs.

HOLLIS DESHAUN KING — RESPONDENT

MOTION PURSUANT TO CR 60.02

(Filed Oct. 8, 2010)

* * * * * *

Comes now the Commonwealth, by counsel, and files this motion pursuant to CR 60.02 seeking relief from the Fayette Circuit Court's order entered on March 8, 2010, in *Commonwealth of Kentucky v. Hollis King*, Fayette Circuit Court Indictment No. 05-CR-01500-002, dismissing the above-styled action with prejudice. The Fayette Circuit Court dismissed the case with prejudice while the Commonwealth was in the process of seeking a writ of *certiorari* with the United States Supreme Court. The trial court was without authority to do this. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 to relieve the Commonwealth of the order entered March 8, 2010, dismissing the above-styled case with prejudice. In support of this motion, the Commonwealth states the following:

1. On November 21, 2005, the Fayette County Grand Jury returned a true bill in Indictment No. 05-CR-1500 charging Respondent with first-degree trafficking in a controlled substance, trafficking in marijuana (eight ounces to five pounds), and being a second-degree persistent felony offender ("PFO"). (TR, 6-7). Respondent was subsequently arraigned on the foregoing charges, at which time he entered a plea of not guilty. (TR, 20).

2. On January 16, 2006, Respondent filed a motion to suppress the evidence seized by the police in this matter. (TR, 21-22). On March 23, 2006, the Fayette Circuit Court conducted a suppression hearing. (TR, 30). Officer Cobb was the only witness to testify at this proceeding. (TR, 72). The circuit court entered a written opinion and order denying the suppression motion on June 2, 2006. (TR, 72-80). Respondent then moved the circuit court to reconsider this decision. (TR, 81). This request was denied by the circuit court as well. (TR, 88).

3. Alter his suppression motion was denied, Respondent elected to change his plea and enter into a plea agreement with the Commonwealth. (TR, 94-96). On July 21, 2006, the Fayette Circuit Court accepted Respondent's guilty plea to first-degree trafficking in a controlled substance, possession of marijuana (amended from trafficking in marijuana), and being a second-degree PFO. (TR, 97-98). The guilty plea was conditioned on Respondent reserving his right to appeal from the circuit court's decision regarding his motion to suppress. (TR, 97).

4. Respondent was finally sentenced on August 25, 2006. (TR, 112-114). The written final judgment was entered on August 29, 2006. (TR, 112-114). In accordance with the plea agreement, the circuit court imposed a sentence of five years as to the trafficking in a controlled substance charge, enhanced to ten years by the PFO charge, and twelve months as to the marijuana possession charge. (TR, 112-114).

5. Respondent appealed the trial court's denial of his motion to suppress to the Kentucky Court of Appeals. (Kentucky Court of Appeals Opinion: Appendix, p. 1-9). On appeal, the Office of Attorney General represented the Commonwealth. The Department of Public Advocacy represented Respondent. The Court of Appeals affirmed Respondent's conviction in a not-to-be published opinion rendered March 14, 2008. (Kentucky Court of Appeals Opinion: Appendix, p. 1-9).

6. Respondent sought discretionary review with the Kentucky Supreme Court. The Kentucky Supreme Court granted discretionary review and reversed the Kentucky Court of Appeals' decision, and remanded the case to the Fayette Circuit Court in a to-be published opinion rendered January 21, 2010. (Kentucky Supreme Court Opinion: Appendix, pp. 10-25). The Kentucky Supreme Court's Opinion became final on February 11, 2010.

7. Following the Kentucky Supreme Court's opinion, the Commonwealth began drafting a Petition for Writ of *Certiorari* with the United States Supreme

Court. The due date for the Petitioner's Writ was April 21, 2010. (Docket Sheet: Appendix, pp. 26-27). Petitioner filed its Petition with the United States Supreme Court on April 19, 2010, (Docket Sheet: Appendix, pp. 26-27).

8. While the Office of Attorney General, who prosecuted the case for the Commonwealth on appeal, was drafting the petition for writ of *certiorari*, this Court docketed Respondent's case on remand. This Court granted the Respondent's motion to suppress and, over the Commonwealth's objection, dismissed the case with prejudice. (Appendix, p. 28).

9. Appellate counsel for Respondent likewise was unaware of this Court's actions and filed several pleadings on Respondent's behalf with the United States Supreme Court, including a waiver of right to respond (May 17, 2010), an extension motion, motion to proceed in forma pauperis (August 24, 2010), and a brief in opposition to the writ of *certiorari* (August 24, 2010). (Docket Sheet: Appendix, pp. 26-27).

10. On September 28, 2010, the United States Supreme Court granted the Commonwealth's petition for a writ of certiorari. (Docket Sheet: Appendix, pp. 26-27). The Commonwealth's brief is currently due November 12, 2010. Oral arguments are tentatively scheduled for January 2011.

11. On October 4, 2010, Respondent's appellate counsel contacted the undersigned counsel and informed them that she would be filing a motion to dismiss the action in the United States Supreme

Court because the Fayette Circuit Court had dismissed Respondent's case with prejudice on March 8, 2010.

12. The Commonwealth's motion pursuant to CR 60.02 follows.

MEMORANDUM IN SUPPORT OF THE MOTION FOR BELATED APPEAL

Under CR 60.02 this court may relieve the Commonwealth of this Court's final order entered March 8, 2010, upon the following grounds: "(a) mistake, inadvertence, surprise or excusable neglect; . . . or (f) any other reason of an extraordinary nature justifying relief." This Court should grant the Commonwealth's CR 60.02 motion because this Court had no authority to dismiss the Respondent's case with prejudice. Moreover, the United States Supreme Court has granted *certiorari* in this case resulting in extraordinary circumstances justifying relief under CR 60.02.

This Court had no authority to dismiss Petitioner's case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). In *Gibson*, the Court discussed the interrelationship of the three branches of government in resolving criminal matters. Section 28 of the Kentucky Constitution prohibits any member of our three branches of government from

exercising power that is vested in another branch. *Id.*, at 689. The Constitution confers upon the executive branch the power to charge persons with crimes and to prosecute them. *Id.*, at 689-90. The judicial branch has the power to "conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature." *Ibid.* The Court concluded that a dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" *Id.* at 691. *See also Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice.)

Here, this unknowingly encroached upon the power of the executive branch to prosecute by dismissing the case with prejudice. This Court acted without authority and in direct contradiction to Kentucky Supreme Court precedent. *Gibson*, 291 S.W.3d at 689-90. Indeed, as the concurrence in *Gibson* states, "the trial court's characterization of dismissing a criminal charge 'with prejudice' is an unconstitutional invasion by the judiciary into an executive function, and is without any legal effect pursuant to Sections 27 and 28 of the Kentucky

Constitution. The trial court has no constitutional authority to instruct the prosecution as to what crimes it can prosecute." *Id.*, at 692 (Cunningham, J., concurring). Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 and determine that it was without authority to dismiss the present action with prejudice.

Additionally, extraordinary circumstances necessitate the granting of the Commonwealth's CR 60.02 motion. When this Court dismissed Respondent's case, the Commonwealth was already in the process of drafting a petition for a writ of *certiorari* with the United States Supreme Court. The Commonwealth had 90 days from the time the Kentucky Supreme Court's opinion became final to file its petition for a writ *of certiorari*. As this Court is well aware, the United States Supreme Court denies the vast majority of petitions filed. In the term that was most recently-concluded as of June 9, 2009, for example, 8,241 petitions were filed, with a grant rate of approximately 1.1%. *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S.Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). The Commonwealth filed its petition for a writ of *certiorari* on April 19, 2010. Respondent's appellate counsel filed a response on Respondent's behalf. Neither appellate counsel was aware of this Court's order dismissing with prejudice.

The Commonwealth now has only a short period of time to correct this error, The United States Supreme Court granted *certiorari* on September 28, 2010 and has tentatively scheduled oral arguments

for January, 2011. As such, time is of the essence to correct this clear error. Without correction by this Court, a clear and unintentional mistake could forever prevent review of this case by the Supreme Court of the United States.

CONCLUSION

Wherefore, for all the foregoing reasons, this Court must grant the Commonwealth's motion pursuant to CR 60.02 and rescind its order entered March 8, 2010, which dismissed Respondent's case with prejudice.

Respectfully submitted,

/s/ [Illegible]
JOSHUA D. FARLEY

/s/ Bryan D. Morrow
BRYAN D. MORROW
ASSISTANT ATTORNEY GENERAL
OFFICE OF CRIMINAL APPEALS
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
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(502)696-5342

COUNSEL FOR THE COMMONWEALTH

NOTICE

The parties will take notice that the foregoing motion will come on for hearing before the Fayette Circuit Court, Criminal Branch, Third Division, on Friday, October 8, 2010, at the hour of 10:30 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing motion has been delivered on this the 6th day of October, 2010, upon the following:

Fayette Circuit Court Clerk
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Judge, Fayette Circuit Court
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Hon. Andrea Mattingly Williams
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Hon. Jamesa J. Drake
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Respectfully submitted,

/s/ [Illegible]
JOSHUA D. FARLEY

/s/ Bryan D. Morrow
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COUNSEL FOR THE COMMONWEALTH

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH – THIRD DIVISION
CASE NO. 05-CR-1500-2

COMMONWEALTH
OF KENTUCKY PETITIONER

v.

HOLLIS DESHAUN KING RESPONDENT

REPLY TO THE COMMONWEALTH'S 60.02 MOTION

(Filed Oct. 12, 2010)

* * * * * * *

INTRODUCTION

The Commonwealth urges this Court to "rescind" its March 8, 2010, Order dismissing the indictment in the above-captioned case "with prejudice" pursuant to either CR 60.02(a) or (f). Neither subsection entitles the Commonwealth to the relief it seeks.

CR 60.02(a) authorizes a court to relieve a party of an order when a "mistake" has occurred.[1] According to the Commonwealth, the "mistake" in question is this Court's Order dismissing the case "with prejudice."

---

[1] CR 60.02(a) also authorizes a court to relieve a party of an order on the basis of "excusable neglect." The Commonwealth makes no argument that its failure to timely file a motion to stay the mandate of the Kentucky Supreme Court or its failure to take an appeal from the Order dismissing the case "with prejudice" is "excusable."

There are two problems with the Commonwealth's argument. First, this Court did not err when it dismissed the above-captioned case with prejudice, and *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009), does not suggest otherwise. Second, even assuming, *arguendo*, that this Court did err, Kentucky courts have long held that legal error, which could have been addressed through the normal appellate process, does not constitute a "mistake" or ground for relief under CR 60.02.

CR 60.02(f) does not help the Commonwealth, either. That subsection permits a court to grant relief when a "reason of an extraordinary nature" exists. As far as King can tell, the gist of the Commonwealth's argument is that this Court should look askance at its failure to take appropriate measures to ensure that this case was in the proper procedural posture for further appellate review because the U.S. Supreme Court rarely grants a petition for writ of *certiorari*. That argument inexplicably ignores King's overriding entitlement to finality. As discussed more fully herein, neither CR 60.02(a) or (f) applies here. This Court should deny the Commonwealth's CR 60.02 motion.

SUPPLEMENTAL STATEMENT OF PROCEDURAL HISTORY

King accepts the Commonwealth's statement of the procedural history of this case, and supplements it with these facts. Following the Kentucky Supreme

Court's mandate reversing the denial of King's motion to suppress evidence, vacating King's conviction, and remanding the case to the Fayette Circuit Court for proceedings "consistent with" its opinion, *see King v. Commonwealth,* 302 S.W.3d 649, 657 (Ky. 2010), this Court convened a hearing attended by King, King's trial attorney, and the Commonwealth's Attorney. This Court read the mandate aloud to the parties, VR: 3/4/10; 1:04:00-1:04:45, and it sustained King's motion to suppress evidence, VR: 3/4/10; 1:05:02. This exchange followed:

> COURT: That being the case, Ms. Williams, is there anything to come before the court?
>
> PROSECUTOR: We would just move to dismiss the case, Your Honor, without prejudice.
>
> DEFENSE COUNSEL: Your Honor, we'd object to a dismissal without prejudice. It should be a dismissal with prejudice.
>
> PROSECUTOR: Judge, if we have any other evidence that surfaces in light of this, then, um, we could bring the case back before the Grand Jury.
>
> DEFENSE COUNSEL: Judge, with all due respect, there's no evidence, it's all been suppressed.

PROSECUTOR: There was – if I remember correctly, he was seen outside making a deal with someone.[2]

DEFENSE COUNSEL: Absolutely not. Absolutely not. And, Your Honor, I think that with the ruling and the dismissal, we should be entitled to have these charges expunged or at least ask for that, and with or with out prejudice he's not allowed to. He's already served four years and two months in prison.

COURT: As I remember this case, there was a confidential informant and a buy and somebody ran into this apartment building, ran down the hall, the officers lost track and heard a door slam, thought – they weren't sure exactly which door it was – they went down the end of the hall and they smelled the marijuana coming from underneath the door where Mr. King and two other individuals were later found and they went into that door, when in fact as it later turned out, the defendant that they were pursuing – or the suspect that they were pursuing – actually went into the door on the right. That's my

---

[2] The Commonwealth's repeated mischaracterization of the facts is troubling. Among other things, the Commonwealth asserted in its Petition for Writ of *Certiorari* – erroneously – that King sold cocaine to an undercover police officer. See Pet. at 31 ("Had the Respondent in this case made the sale in Virginia. . . . Respondent, however, did not make the sale in Virginia. He made it in Kentucky. . . .") As this Court has repeatedly reminded the Commonwealth, the cocaine dealer and King are not the same person.

> recollection of what happened. You know, I don't know of any – anything they could bring back up. I don't know of anything else that could be discovered. I mean, you know, they were in there. It is, what it is, as the old saying goes. You know, what was in there, and the Supremes have ruled that the entry by the law enforcement was in violation of Mr. King's rights and I respect that. I'm going to – in view of the fact – once all this evidence inside the apartment is suppressed, Ms. Williams, at the present time is there anything more to move forward with by the Commonwealth?
>
> PROSECUTOR: No. That's why we move to dismiss it, Judge.
>
> COURT: I understand the Commonwealth's position – I think that in this case, when there's really not anything else that I don't think can come up, I'm going to dismiss the charges at the request of the defendant. I'm going to dismiss the charges with prejudice and let Mr. King get on with his life and move on. So, I'll enter and order and the charges are dismissed with prejudice.

(VR: 3/4/10; 1:05:10-1:08:30).

As the foregoing demonstrates, this Court dismissed the indictment "with prejudice" because the Commonwealth Attorney's was unable to identify any evidence not subject to the suppression order that could be used to prove the allegations against King.

The resulting Order, which was entered on March 8, 2010, provided:

> Based upon the Remand from the Kentucky Supreme Court, it is ORDERED that the Defendant's Motion to Suppress is hereby SUSTAINED.
>
> The Commonwealth made a Motion to Dismiss the case without prejudice over the objection of the Defendant to the case being dismissed without prejudice. The Court having heard arguments of Counsel and being otherwise sufficiently advised; IT IS ORDERED that the case shall be Dismissed With Prejudice.[3]

On October 6, 2010, this Court convened a hearing concerning the Commonwealth's CR 60.02 motion. Again, this Court inquired about the Commonwealth's evidence against Mr. King. For a second time, the Commonwealth was unable to identify any evidence not subject to the suppression order that could be used to prove the allegations against King.[4]

---

[3] The Order appears in the trial court record, but it has not been assigned a page number.

[4] King attempted to recite the exact exchange that occurred between this Court and the Commonwealth's Attorney on October 8, 2010. However, the Clerk's Office has informed counsel that as of this filing date, this Court's recording equipment is not functioning properly and therefore counsel is unable to review a recording of the October 8, 2010, proceedings.

ARGUMENT

I. CR 60.02(a) does not provide an avenue for relief because this Court was not "mistaken" when it dismissed the indictment "with prejudice" and because legal error does not constitute a "mistake" for purposes of the rule.

CR 60.02(a) provides that a court "may, upon such terms as are just, relieve a party . . . from its . . . order . . . upon the following grounds: (a) mistake. . . ." Given the Commonwealth's failure to take adequate measures to ensure that King's case was in the proper procedural posture for United States Supreme Court review (*e.g.* by filing a motion to stay the Kentucky Supreme Court's mandate or appealing the March 8, 2010, Order), one would have expected the Commonwealth to argue that the "mistake" in question was its own oversight. *But see United Bonding Ins. Co. v. Commonwealth,* 461 S.W.2d 535 (Ky. 1970) (the "unexplained failure to perfect a proper appeal was not ground for relief under CR 60.02.")

Instead, the Commonwealth boldly claims that the "mistake" in question lies with this Court. Referring to *Gibson v. Commonwealth,* 291 S.W.3d 686 (Ky. 2009), and this Court's Order dismissing the case "with prejudice," the Commonwealth argues: "[T]ime is of the essence to correct this clear error. Without correction by this Court, a clear and unintentional mistake could forever prevent review of this Court by the Supreme Court of the United States." Commonwealth's motion at 6.

This Court's Order dismissing the indictment against King is not "mistaken." In *Gibson,* the Commonwealth moved the trial court to dismiss the indictment "without prejudice" "on the eve of trial" because "its case . . . had substantially deteriorated." *Id.* at 687. The opinion provides no additional information about how or why the case had "deteriorated," but the Court assumed that it could be "resurrected" at a later date. *Id.* at 688.

After the defendant learned of the order dismissing the case "without prejudice," she moved the trial court to amend the order to reflect a dismissal "with prejudice." *Id.* at 688. The trial court denied that motion, and the defendant appealed. *Id.* at 688. The Kentucky Supreme Court affirmed the trial court's ruling, and it encouraged the defendant to "demand the trial she needs to 'clear her name.'" *Id.* at 691.

Gibson instructs that, as a general principle, a trial court violates the separation of powers provision of the state constitution when it prematurely forecloses any future attempt by the Commonwealth to prosecute a criminal defendant by dismissing a case "with prejudice." *Gibson v. Commonwealth,* 291 S.W.3d 686, 691 (Ky. 2009).

Gibson further instructs that, concomitantly, a trial court does not err when it dismisses a case "with prejudice" if the Commonwealth consents or when, the "underlying substantive law" dictates that result. *Id.* at 691. Accordingly, if "recognized principles of Constitutional law" operate independently to

preclude any further prosecution, then a dismissal "with prejudice" is appropriate. *Id.* at 691. For example, a trial court does not err when it dismisses an indictment "with prejudice" when the prosecution in question is jeopardy barred. *Id.* at 691.

This Court's Order dismissing the indictment "with prejudice" is fully supported by the rationale in *Gibson.* After the Kentucky Supreme Court vacated King's judgment of conviction and remanded his case back to this Court, the Commonwealth had the option of taking the case to trial. Instead, the Commonwealth chose to dismiss the indictment because it could conceive of no evidence against King, other than the evidence rendered inadmissible pursuant to the suppression order. The Order did not prematurely preempt the Commonwealth from prosecuting King; rather, the lack of evidence prevents the Commonwealth from prosecuting King.

Stated differently, "underlying substantive law" operates independently to dictate a dismissal "with prejudice." The Commonwealth has repeatedly represented that it can conceive of no admissible evidence against King. The "underlying substantive law" concerning due process and sufficiency-of-the-evidence would support a directed verdict of acquittal if the case went to trial. Those same "principles of Constitutional law" support this Court's decision to dismiss the case "with prejudice." *See e.g. In re Winship,* 397 U.S. 358 (1970).

Eight months have now passed between the time that this Court entered the Order dismissing the indictment "with prejudice" and the time that the Commonwealth filed its CR 60.02 motion. The Commonwealth has had ample opportunity to contemplate what additional evidence might exist against King. On October 8, 2010, this Court again asked the Commonwealth whether it could identify any evidence, not subject to the suppression order, which could be used to prosecute King. And again, the Commonwealth could think of nothing.

Gibson suggests that a defendant who seeks to "clear his name" should demand a trial, rather than seek a dismissal "with prejudice." *Id.* at 691. However, given the Commonwealth's acknowledgement that no admissible evidence against King exists, this Court was not required to waste precious judicial resources presiding over a sham trial that was certain to end in a directed verdict. *In re Winship,* supports this Court's Order. The Commonwealth is not entitled to perpetually hang the possibility of a trial over a defendant's head when it admits (repeatedly) that it can conceive of no admissible evidence against him.

Even assuming *arguendo* that this Court did err by dismissing the case "with prejudice," CR 60.02(a) would not entitle the Commonwealth to the relief it seeks. Kentucky courts have long held that legal error, which could have been addressed through the normal appellate process, does not constitute a ground for relief under CR 60.02. *See e.g. Howard v. Commonwealth,* 364 S.W.2d 809, 810-11 (Ky. 1963)

(so stating); *Wimsatt v. Haydon Oil Co.,* 414 S.W.2d 908, 910 (Ky. 1967) ("The error, if any, was an error of law by the trial court, and subject to review upon appeal in due course; in such a circumstance CR 60.02 may not be invoked as an alternative method of review."); *City of Covington v. Sanitation District No. 1 of Campbell and Kenton Counties,* 459 S.W.2d 85, 87 (Ky. App. 1970) ("[N]o ground for relief under CR 60.02 was alleged except that the judgment was based on an error of law. This, of course, was not sufficient to permit a reopening of the judgment."); *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983) (CR 60.02 is "for relief that is not available by direct appeal"). This Court should decline the Commonwealth's invitation to "rescind" its Order dismissing the case "with prejudice" pursuant to CR 60.02(a).

II. CR 60.02(f) does not provide an avenue for relief because "extraordinary circumstances" do not justify rescinding this Court's Order.

CR 60.02 provides that "a court may, upon such terms as are just, relieve a party . . . from its . . . order . . . upon the following grounds: . . . (f) any other reason of an extraordinary nature justifying relief." In *Cawood v. Cawood,* 329 S.W.2d 569, 571 (Ky. 1959), the Court instructed that "because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only in the most unusual circumstances." *See also Bashir v. Bashir,* 698 S.W.2d 823, 826 (Ky. 1985)

("The strong and sensible policy of the law in favor of the finality of judgments has historically been overcome only in the presence of the most compelling equities. Relief under CR 60.02(f) is available where a clear showing of extraordinary and compelling equities is made.")

The "equities" at play here do not militate in the Commonwealth's favor. King spent over four years in prison on this case and he would like nothing more than to take this Court's advice to "get on with his life and move on." (VR: 3/4/10; 1:08:29). King's strong interest in finality is "axiomatic." *Baze v. Commonwealth,* 276 S.W.3d 761, 768 (Ky. 2008). The Commonwealth's interest in overturning the Kentucky Supreme Court's mandate ceased to outweigh King's interest in finality when the Commonwealth failed to avail itself of the proper mechanisms for ensuring that the case could be reviewed by the United States Supreme Court. The grant of a writ of *certiorari* is "extraordinary" in the colloquial sense of the word, but that fact alone is not a cure-all for the Commonwealth's failure to get its own house in order. CR 60.02(f) does not provide a basis for the relief the Commonwealth seeks.

CONCLUSION

This Court should deny the Commonwealth's CR 60.02 motion. Just cause does not exist for this Court to "rescind" its March 8, 2010, Order dismissing the

indictment in the above-captioned case "with prejudice."

Respectfully submitted,

/s/ Jamesa J. Drake
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* Counsel of Record for Hollis King

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing motion was served this 12th day of October, 2010, upon the following parties:

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503 Robert F. Stephens Courthouse
120 North Limestone
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[LOGO]

COMMONWEALTH OF KENTUCKY

DEPARTMENT OF PUBLIC ADVOCACY

100 FAIR OAKS LANE, SUITE 301 • FRANKFORT,
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October 12, 2010

William K. Suter
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

Re: *Kentucky v. Hollis Deshaun King*,
No. 09-1272

Dear General Suter:

The purpose of this letter is to inform the Court about the litigation the Commonwealth has initiated in state court following the grant of *certiorari* on September 28, 2010.

On October 4, 2010, undersigned counsel learned that when this case was on remand from the Kentucky Supreme Court, the Fayette Circuit Court entered an order dismissing the indictment "with prejudice." The Commonwealth did not file a motion to stay the Kentucky Supreme Court's mandate reversing the denial of King's motion to suppress and vacating the judgment against him, and it did not appeal the order dismissing the case "with prejudice." That order became final before the Commonwealth filed its Petition for Writ of *Certiorari*.

On October 6, 2010, the Commonwealth filed a motion to "rescind" the order dismissing the case "with prejudice." On October 8, 2010, the parties argued that motion in Fayette Circuit Court and the presiding judge indicated that he expects to rule on or before October 15, 2010. Copies of the Commonwealth's motion and King's response are appended.

The order dismissing the case "with prejudice" renders this case moot and any decision by this Court advisory in nature. King intends to file a Motion to Dismiss the Commonwealth's appeal on or before October 22, 2010.

Sincerely,

/s/ Jamesa J. Drake
Jamesa J. Drake
Counsel of Record for Mr. King

Cc: Joshua D. Farley
Bryan D. Morrow
Judge James D. Ishmael, Jr.,
Fayette Circuit Court

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION
No. 05-CR-1500-2

COMMONWEALTH
OF KENTUCKY PETITIONER

vs.

HOLLIS DESHAUN KING RESPONDENT

MOVANT'S REPLY PURSUANT TO CR 60.02

(Filed Oct. 13, 2010)

* * * * * * *

REPLY IN SUPPORT OF THE CR 60.02 MOTION

This Court had no authority under the Kentucky Constitution to dismiss Petitioner's case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. *Gibson v. Commonwealth,* 291 S.W.3d 686 (Ky. 2009). In *Gibson*, the Court discussed the interrelationship of the three branches of government in resolving criminal matters. Section 28 of the Kentucky Constitution prohibits any member of our three branches of government from exercising power that is vested in another branch. *Id.*, at 689. The Constitution confers upon the executive branch the power to charge persons with crimes and to prosecute them. *Id.*, at 689-90. The judicial branch

has the power to "conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature." *Ibid.* The Court concluded that a dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" *Id.* at 691. *See also, Commonwealth v. Baker,* 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice.) Other cases set forth this same premise. *See Commonwealth v. Isham,* 98 S.W.3d 59 (Ky. 2003) (holding "In *Hicks v. Commonwealth,* S.W.2d 35 (Ky. 1994), we held that it was not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held. *Id.* at 37. It was further held that the proper time for such an evaluation is upon motion for directed verdict. *Id.*" and further stating that the trial court lacked the authority to dismiss the complaint prior to trial); and *Commonwealth v. Shaw,* unpublished 2004 WL 178703 (Ky. App. 2004) (holding that the trial court lacked the authority to dismiss the indictment).

Indeed, as the concurrence in *Gibson* states, "the trial court's characterization of dismissing a criminal

charge 'with prejudice' is an unconstitutional invasion by the judiciary into an executive function, and is without any legal effect pursuant to Sections 27 and 28 of the Kentucky Constitution. The trial court has no constitutional authority to instruct the prosecution as to what crimes it can prosecute." *Id.*, at 692 (Cunningham, J., concurring), Therefore, this Court's dismissal "with prejudice" was void *ab initio. See City of Henderson v. Lieber's EX'R ET AL*, 192 S.W. 830 (Ky. App. 1917) (holding that a statute enacted in contravention of the Constitution is "void ab initio and any action taken thereunder is a nullity."). Here, this Court's judgment in dismissing the current case "with prejudice" was in contravention of the Kentucky Constitution and as such its judgment is also void *ab initio.* A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews,* 731 S.W.2d 832, 833 (Ky.App. 1987). Just as the concurrence in *Gibson* seems to emphasize, the ruling is therefore a legal nullity and a court has no discretion in determining whether it should be set aside. *See, Foremost Insurance Company v. Whitaker,* 892 S.W.2d 607 (Ky.App. 1995).

Given that this Court's dismissal with prejudice is void *ab initio* it may be challenged upon a CR 60.02 motion, simply within a reasonable time. *See Foremost,* at 610. The Commonwealth was not required to avail itself of a direct appeal. While that may appear to be a preferable course of action, here since this Court's judgement is void, it must be set aside when

brought within a reasonable time via a CR 60.02 motion. *Ibid.*; *See City of Henderson* at 830-833 and *Mathews* at 833. It should also be noted that the Commonwealth may avail themselves of CR 60.02, *See Winstead v. Commonwealth,* unpublished 2008 WL 5191197 (Ky.App. 2008). The Commonwealth has properly brought its CR 60.02 motion within a reasonable time, setting forth that this Court's dismissal with prejudice is void *ab initio.* Under CR 60.02(e) the trial court has no discretion in determining whether to set the judgment aside, it must do so since the judgement is void *ab initio. See, Foremost* at 610. Therefore, this Court should grant the Commonwealth's motion pursuant to CR 60.02 and determine that it was without authority to dismiss the present action with prejudice.

CONCLUSION

Wherefore, for all the foregoing reasons, this Court must grant the Commonwealth's motion pursuant to CR 60.02 and rescind its order entered March 8, 2010, which dismissed Respondent's case with prejudice.

Respectfully submitted,

/s/ [Illegible]
JOSHUA D. FARLEY

/s/ Bryan D. Morrow
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COUNSEL FOR THE COMMONWEALTH

CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing motion has been delivered on this the 13th day of October, 2010, upon the following:

Fayette Circuit Court Clerk
Criminal Branch
120 North Limestone Street
Lexington, Kentucky 40507
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Respectfully submitted,

/s/ [Illegible]
JOSHUA D. FARLEY

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COUNSEL FOR THE COMMONWEALTH

APPENDIX

Hollis Deshaun King 2005-CR-1500-2

1) Westlaw, 2004 WL 178703 (Ky. App.)
Commonwealth v. Shaw,
2003-CA-000522-MR A1-A6

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH – THIRD DIVISION
CASE NO. 05-CR-1500-2

COMMONWEALTH
OF KENTUCKY PETITIONER

v.

HOLLIS DESHAUN KING RESPONDENT

RESPONSE TO THE COMMONWEALTH'S REPLY IN SUPPORT OF THE CR 60.02 MOTION

(Filed Oct. 14, 2010)

* * * * * * *

On October 8, 2010, the Commonwealth filed a CR 60.02 motion. On October 12, 2010, King filed a Reply. On October 13, 2010, the Commonwealth filed a Response to King's Reply. King now responds to the Commonwealth's most recent pleading.

In its original motion, the Commonwealth urged this Court to "rescind" the March 8, 2010, Order dismissing the case "with prejudice" pursuant to CR 60.02(a) and (f). King responded by explaining that neither subsection entitled the Commonwealth to the relief it seeks.

In its Reply in Support of the CR 60.02 motion, the Commonwealth raises a new argument. In this latest pleading, the Commonwealth now contends that this Court should "rescind" the Order pursuant to CR 60.02 (e). *See* CW Reply at 3.

CR 60.02(e) provides that "a court may, upon such terms as are just, relieve a party or his legal representative from its . . . order . . . upon the following grounds: . . . (e) the judgment is void. . . ."

The Commonwealth raises a three-part argument, which builds on itself. First, the Commonwealth renews its argument that this Court erred by dismissing the case "with prejudice" in violation of the Kentucky Constitution. *See* CW Reply at 1-2 (discussing *Gibson v. Commonwealth,* 291 S.W.3d 686 (Ky. 2009)). Second, the Commonwealth argues that because the Order violated the Kentucky Constitution, it was void ab initio. *See* CW Reply at 2 ("Here, this Court's judgment in dismissing the current case 'with prejudice' was in contravention of the Kentucky Constitution and as such its judgment is void *ab intio.*") Third, the Commonwealth asserts that because the Order was void ab initio, it was "not required to avail itself of a direct appeal." CW Reply at 3.

That argument is not well-taken for three reasons. First, as discussed at length in King's Reply to the Commonwealth's CR 60.02 motion – and thus not repeated here – the March 8, 2010, Order was not in error. Pursuant to *Gibson*, a court may dismiss a case "with prejudice" when the "underlying substantive law" "precludes further litigation" and dictates that result. *Gibson,* 291 S.W.3d at 691. A conviction founded on legally insufficient evidence violates due process; the Commonwealth's lack of admissible evidence "precludes further litigation" here. *See Jackson v.*

Virginia, 443 U.S. 307, 317 (1979) ("It is axiomatic that a conviction upon a charge not made . . . constitutes a violation of due process.")

Second, even assuming, *arguendo,* that this Court's Order dismissing the case "with prejudice" was in error, the error did not render the Order void ab initio. Kentucky courts have long-held that: "The generally accepted rule is that where the court has jurisdiction of the parties and subject matter, the judgment, if erroneous, is voidable, not void." *Dix v. Dix,* 222 S.W.2d 839, 842 (Ky. 1949). And, an "error rendering a judgment voidable cannot be challenged in a collateral action." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 431 (Ky. App. 2008).

Third, the Commonwealth was required "to avail itself of a direct appeal." Again, even assuming, *arguendo,* that the Order was in error, a party may not work an end-around the direct appeal process by raising a claim of legal error for the first time in a CR 60.02 motion. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) ("CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies but is available only to raise issues which cannot be raised in other proceedings."); *Gross v. Commonwealth,* 648 S.W.2d 853, 856 (Ky. 1983) (CR 60.02 is "for relief that is not available by direct appeal and not available under RCr 11.42."); *Covington v. Sanitation Dist. No. 1*, 45 S.W.2d 85, 87 (Ky. 1970) ("[N]o ground for relief under CR 60.02 was alleged except that the judgment was based on an error of

law. This, of course, was not sufficient to permit a reopening, of the judgment.").

For all of the reasons advanced herein and in King's Reply to the Commonwealth's 60.02 Motion, King respectfully requests that this Court deny the Commonwealth's CR 60.02 motion.

Respectfully submitted,

/s/ Jamesa J. Drake
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing motion was served this 14th day of October, 2010, upon the following:

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(hand delivered)

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Judge, Fayette Circuit Court
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FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V — NO. 05-CR 1500-2

HOLLIS DESHAUN KING — DEFENDANT

OPINION

(Filed Oct. 19, 2010)

* * * * * * *

This matter is before the Court on Motion of the Commonwealth, through the Attorney General's Office, pursuant to CR 60.02(a)(f), for the Court to "relieve the Commonwealth" of the Court's Order entered March 8, 2002 that Dismissed the charges against the Defendant with prejudice. The Court has considered the Motion, the Response by the Defendant's Counsel and, although unauthorized, the Reply by the Attorney General's Office and the Reply by King's attorney. The Court has also had the benefit of oral arguments of Counsel.

The Commonwealth argues that this Court had no authority to Dismiss the charges against King with prejudice citing *Gibson v Commonwealth*, 291 S.W.3d 686 (Ky. 2009). *Gibson, supra* involved a pre-trial matter wherein the trial court, without the benefit of hearing evidence or conducting a trial or having the case Remanded from the Kentucky

Supreme Court.[1] *Gibson, supra* is not controlling authority on the issue before the Court because of the significant differences in the posture of the cases and the differences in the obligations of the trial courts under the particular circumstances. It is undisputed that the Fayette Commonwealth Attorney's Office has represented to this Court, both at the hearing after Remand from the Kentucky Supreme Court and in oral arguments on this Motion, that it would have no evidence to support any charges against King that was not the subject of the Kentucky Supreme Court's Reversal and Remand cited above. *King, supra* at 657.

The Attorney General argues that the Order of March 8, 2010 should be modified to delete the Dismissal "with prejudice" language pursuant to CR 60.02(a) "mistake, inadvertence, surprise or excusable neglect . . . " or "(f) any other reason of an extraordinary nature justifying relief." Without reference to the Record or to any factor set out in CR 60.02(a) above, the Attorney General, in both the written filings and in oral arguments, in a tone and manner that can only be described as abrasive, argues that this Court had no authority to Dismiss the charges against King with prejudice notwithstanding the Kentucky Supreme Court mandate and the Fayette County Attorney's representations to the Court. There was

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[1] The Remand held that " . . . the denial of King's Motion to Suppress evidence is reversed, and King's judgment of conviction is vacated", *King v Commonwealth*, 302 S.W.3d 649, 657 (Ky. 2010)]

no appeal of the Court's March 8, 2010 Order by the Commonwealth.

Strangely, the Attorney General does not argue, and this Court does not find, that any factor set out in CR 60.02(a) is applicable to the pending Motion. The dilemma in which the Attorney General now finds itself was of its own making, i.e., not letting any Counsel of Record, the Fayette Commonwealth Attorney's Office or this Court know that it was contemplating, drafting or filing a Petition for Writ of *Certiorari* with the United States Supreme Court. That is undisputed and confirmed by Counsel at the oral arguments on October 8, 2010. The Motion to Modify the Order pursuant to CR 60.02(a) is DENIED.

Turning to CR 60.02(f), the Attorney General again argues that this Court had no authority to Dismiss the case with prejudice. That argument has been considered and rejected by this Court. The last argument is that the Granting of the Petition for Writ of *Certiorari* by the United States Supreme Court should be considered as a " . . . reason of an extraordinary nature justifying relief." No case authority was cited by the Attorney General that this action satisfies the requisite "extraordinary nature justifying relief." Rather, the Attorney General blames this Court for following the mandate of the Kentucky Supreme Court for the quandary in which it now finds itself. That is neither sound legal reasoning nor fair to this Court.

This Court is always amenable to having full review of its proceedings and rulings. The "bottom line" is that the ruling should be correct and fair to all parties. In this case, the Attorney General does not deserve any relief based on its own conduct, the tone and nature of its arguments, and the lack of merit to the foregoing arguments.

Nonetheless, this Court will Grant the Motion pursuant to CR 60.02(f) to allow for further review based on the "extraordinary nature" of the Writ of *Certiorari* granted by the United States Supreme Court. An Amended Order is attached hereto and made a part hereof by reference.

Dated this 19th day of October, 2010

/s/ James D. Ishmael Jr.
HON. JAMES D. ISHMAEL JR.

This is to certify that a true and correct copy of the foregoing Order was served upon the following parties, via First Class Mail, this 19 day of October, 2010:

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FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. — NO. 05-CR-1500-2

HOLLIS DESHAUN KING — DEFENDANT

AMENDED ORDER

(Filed Oct. 19, 2010)

* * * * * * *

On Motion of the Commonwealth, by and through the Attorney General's Office, and this Court having rendered an Opinion which is made a part hereof by reference as if set out at length herein, and this Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

The Order of this Court entered on March 8, 2010 is hereby Modified to the extent that this case is now Dismissed Without Prejudice as of March 8, 2010. In all other respects, the original Order of March 8, 2010 remains as entered.

Dated this the 19 day of October, 2010.

/s/ James D. Ishmael, Jr.
JUDGE, FAYETTE CIRCUIT COURT

This is to certify that a true and correct copy of the foregoing AmendedOrder was served upon the following parties, via First Class Mail, this 19 day of October, 2010:

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No. 09-1272

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF KENTUCKY,

Petitioner

v.

HOLLIS DESHAUN KING,

Respondent

NOTICE OF STATE COURT PROCEEDINGS

On September 27, 2010, this Court granted the Commonwealth's Petition for Writ of Certiorari to the Kentucky Supreme Court, limited to the First Question Presented. Since that time, the Commonwealth has initiated litigation in state court concerning this case.

On October 4, 2010, undersigned counsel learned that when this case was on remand from the Kentucky Supreme Court, the Fayette Circuit Court entered an order dismissing the case "with prejudice." The Commonwealth did not file a motion to stay the Kentucky Supreme Court's mandate, *inter alia,* vacating the judgment against him, and it did not appeal the order dismissing the case "with prejudice." Undersigned counsel immediately contacted the Commonwealth.

On October 6, 2010, the Commonwealth filed a motion in Fayette Circuit Court to "rescind" the order dismissing the case with prejudice, and on October 8, 2010, the parties argued that motion. On October 19, 2010, the Fayette Circuit Court granted the Commonwealth's motion and entered an amended order, which provided that this case was dismissed without prejudice "as of March 8, 2010." A copy of the court's opinion and order are appended. King has until November 18, 2010, to appeal the Amended Order to the Kentucky Court of Appeals.

King understands that he must quickly decide how to proceed both in this Court and in state court. King anticipates making any necessary motions to this Court by October 29, 2010. Of course, King will keep this Court apprised of any new developments.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 7 - 2010
OFFICE OF THE CLERK

No. 09-1272

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In holding that the drugs discovered in the Respondent's apartment must be suppressed the Kentucky Supreme Court further deepened existing conflicts on two important Fourth Amendment issues: when does lawful police action impermissibly "create" exigent circumstances and does the hot pursuit exception to the warrant requirement only apply when it can be shown that the suspect was aware that he was being pursued. Respondent's brief in opposition fails to address the central issues presented in the petition and attempts to divert this Court's attention in an effort to evade review.

In opposition to the police-created exigency issue, Respondent contends that the different tests espoused by the lower courts essentially amount to the same standard. On the contrary, there are drastic differences between a test that asks whether an officer could have foreseen the exigency (Fourth and Eighth Circuits) and a test that asks whether an officer acted lawfully (Second Circuit). A test that asks whether an officer delayed in obtaining a warrant (First and Seventh Circuits) is dramatically different than a test that asks whether an officer purposefully attempted to evade the warrant requirement (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits). Five starkly different tests are employed by the federal circuits in an attempt to address the police-created exigency issue.

On the hot pursuit issue, Respondent argues that all of the lower courts uniformly apply a "totality of the circumstances" test to determine if the hot pursuit exception is applicable. This argument is in substantial agreement with the argument set forth in the petition; however Respondent fails to acknowledge

that the Kentucky Supreme Court failed to employ a "totality of the circumstances" test and held that the *only* thing that mattered was whether the suspect was aware that he was being pursued, regardless of the surrounding circumstances. Respondent's "vehicle" arguments also lack merit, this case is an ideal vehicle to address these two important issues. This Court's review of both questions is warranted.

I. *Certiorari* is Warranted to Address the Issue of Police-Created Exigencies

A. This Case Is An Ideal Vehicle For Resolving the Conflict Over "Police Created" Exigencies.

Every federal court of appeals, and numerous state courts, have addressed whether police may conduct a warrantless search based on an exigency that arose in response to an officer's lawful actions. As discussed below, these courts have adopted widely disparate tests whose differences are outcome-determinative. The time has come to resolve that conflict. This case is an excellent vehicle for doing so.

The fact pattern of this case — a knock and announce that prompts the apparent destruction of evidence — is a common one that aptly illustrates the problems created by the rule adopted by the Kentucky Supreme Court and several federal circuits. The officers took reasonable and lawful actions, knocking on the door of an apartment from which the smell of burnt marijuana emanated and announcing their presence. Upon hearing sounds indicating the destruction of the

evidence — which they thought included crack cocaine recently sold to an undercover confidential informant — they entered the apartment. The Kentucky Court held that the officers violated the Fourth Amendment when they did so because it was foreseeable that their lawful knock and announce would have prompted the unlawful destruction of the drugs they smelled. As explained in the Petition (at 25-28), that ruling improperly rewards illegal conduct and unduly bars routine and sensible law enforcement measures.

Respondent does not attempt to defend the police-created exigency rule adopted by the Kentucky Supreme Court. Instead, he contends that this Court should not address the issue because the Kentucky Supreme Court "assumed *arguendo*" that an exigency existed before holding that the search was unlawful because the officers created that assumed exigency. Respondent is mistaken.

This Court routinely grants *certiorari* to review legal issues that a lower court decided after assuming the existence of a predicate fact or legal conclusion. Just last term, in *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), this Court granted *certiorari* to resolve whether there was a break-in-custody exception to the *Edwards v. Arizona*, 451 U.S. 477 (1981), rule. This Court reviewed a Maryland Court of Appeals decision which "held that 'the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*,' and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population between interrogations did not constitute a break in custody." *Id.* at 1218. Likewise, in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010),

also from last term, this Court reviewed a Kentucky Supreme Court decision "[a]ssuming the truth of [Padilla's] allegations," and holding "that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction." *Id.* at 1478.[1]

Holding otherwise would cause absurd results. A contrary rule would make myriad lower court rulings on federal law unreviewable by this Court, which would undermine this Court's role as the final arbiter of federal law. See *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds"). Respondent does not dispute that the Kentucky Supreme Court's decision is final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975),

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[1]See also *Pennsylvania v. Mimms*, 434 U.S. 106, 108 (1977) (per curiam), (assessing the stop and pat down of a vehicle's passenger for weapons when the Pennsylvania Supreme Court "assume[d], arguendo, that the limited search for weapons was proper once the officer observed the bulge under respondent's coat."); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (assessing proposed exception to knock and announce rule in case where the Wisconsin Supreme Court "[a]ssum[ed]" the police "did not knock and announce prior to their entry"); *United States v. Place*, 462 U.S. 696, 700 (1983) (assessing whether officer's search of personal luggage was valid under Terry in case where the court of appeals "assumed both that Terry principles could be applied . . . and that reasonable suspicion existed to justify the investigatory stop of Place").

as one where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." The important federal issue in this case concerning the Fourth Amendment police-created exigency doctrine is therefore properly before this Court and, for the reasons discussed below, merits this Court's review.[2]

B. Federal Circuits are Irreconcilably Split on the Issue of Police-Created Exigent Circumstances, Resulting in Directly Contradictory Results

Respondent argues that this Court should deny

[2]Respondent's lengthy digression on whether there were, in fact, exigent circumstances here is therefore irrelevant. See Resp. at 8-16. Respondent's attempts to convince this Court that these officers simply abandoned a fleeing drug trafficker to investigate someone in possession of marijuana are illogical at best. It is absurd to trust that officers who believed that they were in hot pursuit of a fleeing felon would have their "attention diverted" by the detection of the odor of burnt marijuana, such that their chase would cease and a new investigation into a misdemeanor offense would begin. This argument is akin to officers ceasing chase of a felon to issue a traffic citation. Resp. at 3-4. To avoid any misconceptions Respondent may have created, however, it bears noting that: (1) the trial court and Kentucky Court of Appeals both explicitly found that exigent circumstances existed; (2) the officers testified that they believed the crack cocaine dealer whom they had been pursuing had fled into Respondent's apartment; and (3) the officers testified that, based on their training and experience, the noises they heard after knocking and announcing were consistent with the destruction of physical evidence. Pet. App. at 9a-10a, 24a, 27a; Pet. App. at 3a-4a,14a, 18a-19a, 21a-22a, 25a, 27a, 36a-37a; Pet. App. at 19a, 37a. The Kentucky Supreme Court's assumption was therefore an eminently reasonable one.

the writ because the Petitioner has exaggerated the division among the Courts of Appeal regarding when police "create" an exigent circumstance. Resp. at 16. However, cases, commentaries, and treatises all agree that the courts are split on this issue[3].

Many of the cases cited within the petition expressly acknowledged the existence of a conflict. See *United States v. Coles*, 437 F.3d 361, 371-373 (3rd Cir. 2006)(recognizing that the Second Circuit had adopted a test that was "hard to reconcile" with the Fifth Circuit's test, and that the two tests reflect "different inquires."); *United States v. MacDonald*, 916 F.2d 766, 771-773 (2nd Cir. 1990)(en banc), *cert. denied*, 498 U.S. 1119 (1991)(noting the difference in its test and the First Circuit's test.); *United States v. Samboy*, 433 F.3d 154, 160 (1st Cir. 2005) *cert. denied*, 547 U.S. 1118 (2006)(specifically denouncing foreseeability as determinative of whether police created the exigent circumstances, and standing directly contrary to the Fourth and Eighth Circuit's test.); *United States v. Campbell*, 261 F.3d 628, 633-635 (6th Cir. 2001)(directly addressing the difference between the Eighth Circuit's foreseeability test and its own deliberate conduct test.); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) (en banc), *cert. denied*, 502 U.S.907 (1991)(taking notice of the circuit split and distinguishing its test as a deliberate conduct test

[3]Respondent admits that a circuit split exists when he cites to *United States v. McGregor*, 31 F.3d 1067 (1994). Resp. at 20. Prior to this citation, Respondent claims that the Eleventh Circuit had not addressed a police-created exigency test and that the circuits were not divided. However, *McGregor* is itself an Eleventh Circuit police-created exigency case, where the dissent recognizes a split among the circuits. *Id.* at 1069, 1071-1073.

coupled with a delay in obtaining a warrant.); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004)(recognizing the circuit split and setting forth the difference between its test and the D.C. Circuit's test.); *United States v. Duchi*, 906 F.2d 1278, 1284-1286 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995)(acknowledging that the Fifth Circuit looks at the reasonableness of the officer's conduct and adopting instead a test that asks whether the exigency was foreseeable). The Kentucky Supreme Court, too, even acknowledged that a split existed in its opinion. Pet. App. at 44a-46a.

Other acknowledgments of this circuit split can be found in treatises, law reviews, and commentaries. Professor Charles Alan Wright described such a split in his treatise on Federal Practice and Procedure. 3A Fed. Prac. & Proc. Crim. § 678 n. 1 (4th ed.). Katherine Carmon and Amy Beller also both acknowledge and discuss the circuit split for determining when police impermissibly create exigent circumstances in their respective law review articles. See Katherine Carmon, *Don't Act Like You Smell Pot!(At Least Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence*, 87 N.C. L. Rev. 621 (2009); Amy Beller, *United States v. MacDonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 Hofstra L. Rev. 407 (1991). See also 15 A.L.R. 6th 515, §§ 25, 26; 39 Geo. L.J. Ann. Rev. Crim. Proc. 43, n. 163, n. 195 (2010) (comparing cases). As noted in the petition (at 10), and the Amicus Brief of Indiana (at 7-8), several additional articles also find that it is imperative that this Court rectify the current split. See Bryan M. Abramoske, *It*

Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations, 41 Suffolk U.L. Rev. 561 (2008); Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent the Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283 (1988); Geoffrey C. Sonntag, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 Washburn L.J. 629 (2003). There can be no doubt, an irreconcilable circuit split exists that must be rectified by this Court.

Respondent also contends that each of the different tests adopted by the varying circuits essentially amounts to the same test, a reasonableness inquiry test. Resp. at 19-20. Respondent's contentions are meritless.

It has been noted that the Second Circuit "allows police officers more discretion in circumventing the Fourth Amendment's warrant requirement." 87 N.C. L. Rev. 621, 631 (2009). The Second Circuit's test for police-created exigency is an objective test. *Ibid.* Other circuits, like the Fifth Circuit, however, use a subjective test. *Id.*, at 635. The analyses used by the different courts lead to different results under similar fact patterns. "The different outcomes can be attributed to the type of analysis the circuit uses; the Fifth Circuit inquires into the officers' intentions while the Second Circuit only looks objectively at whether the officers' conduct was lawful." *Id.*, at 638. See also Abramoske at 578-585 (analyzing the different outcomes determined from each of the different tests,

i.e., "objective vs. "subjective.").

There is a dramatic difference between a test that looks to foreseeability only (Fourth and Eighth Circuits) and a test that looks only to unreasonable delay (First and Seventh Circuits). Under a foreseeability test evidence is only suppressed if the resulting exigency was foreseeable, whereas regardless of whether any exigency was foreseeable, if it is determined in hindsight that a warrant could have been obtained prior to the exigency arising under the unreasonable delay test, evidence will be suppressed. Comparing the lawfulness test (Second Circuit) to any of the other tests easily highlights differences in outcome. Under the lawfulness test it is only asked whether the officers' actions were lawful; however under the same circumstances if the officers' were determined to have delayed in obtaining a warrant the evidence would be suppressed in the First and Seventh Circuits. Similarly if the same officers were determined to have behaved lawfully, but unreasonably any evidence would be suppressed under the Third and Fifth Circuits' bad faith and unreasonable action test. Again, if an officer was determined to have purposefully evaded the warrant requirement evidence would be suppressed in the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits; however the officer's actions could be determined to have been lawful or reasonable, or the resulting exigency unforeseeable, in which case the evidence would not have been suppressed in either the First, Seventh, Fourth, Eighth, or Second Circuits.

Simply put, applied to these common facts, it may have been foreseeable that the officers' actions

would lead to the destruction of evidence; however there is no basis on which to believe that the officers acted in bad faith or unlawfully. The facts of this case illustrate the outcome determinative nature of the conflict. Under these common facts, the Petitioner certainly would have prevailed in the Sixth, Ninth, Tenth, Eleventh, D.C., and Second Circuits, since the officers' actions were at all times lawful (Second Circuit), and they took no direct action in an effort to purposefully evade the warrant requirement (Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits). It is also likely that the Petitioner would have prevailed in the First and Seventh Circuits, because there was arguably no unreasonable delay in obtaining a warrant. In contrast, Respondent would have prevailed in the Fourth and Eighth Circuits, because like the Kentucky Supreme Court, these circuits ask whether the exigency is foreseeable. Again Respondent may have prevailed in the Third and Fifth Circuits, because the officers smelled marijuana and believed that the suspect was fleeing prior to knocking and announcing themselves at the door. These circuits hold that there must be no evidence of criminal activity prior to an officer's knock and announce, otherwise the officer will be deemed to have created any exigency that arises.

Respondent's contention that a circuit split does not exist or is not so divisive as to create an urgent situation that this Court must now address is without merit. Only this Court can bring the needed uniformity to this area of the law, and ensure that whether evidence is suppressed under the Fourth Amendment does not depend on the state in which the conduct occurs.

II. *Certiorari* is Warranted to Address the Hot Pursuit Exception.

Respondent's argument for using a "totality of the circumstances" test is contrary to the Kentucky Supreme Court's ruling in this case. Resp. at 5-7. Petitioner agrees that a "totality of the circumstances" test should have been employed in this case; however, Petitioner contends that the totality of the circumstances should be viewed from the objective viewpoint of a reasonable officer, not the subjective viewpoint of a fleeing felon. Pet. at 29-35. As set forth in the petition, courts have consistently upheld objective tests over subjective ones. Pet. at 31-35.

The Kentucky Supreme Court relied heavily on its determination that the drug dealer in this case was unaware of police pursuit, and therefore he could not escape or destroy evidence. Pet. App. at 40a-41a. The Kentucky Supreme Court went so far as to quote *State v. Nichols*, 484 S.E.2d 507, 508 (Ga. 1997), for the proposition that the "key" to hot pursuit is whether the defendant was aware he was being pursued. Id. at 40a. It is this strict reliance on the subjective knowledge of the fleeing suspect that is not in-line with a "totality of the circumstances" test, and which conflicts with this Court's precedents mandating that the Fourth Amendment be assessed through objective tests.

Had the Kentucky Supreme Court properly applied a "totality of the circumstances" test based on the objective viewpoint of a reasonable officer, hot pursuit would have been found in this case. Instead the Kentucky Supreme Court created a bright-line rule that the hot pursuit exception will never apply when it

cannot be shown that a suspect was aware that he was being pursued. This error presents a second independent basis for this Court's review.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE STATES OF INDIANA, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, LOUISIANA, MICHIGAN, NEVADA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

2. Does the hot pursuit exception to the warrant requirement apply only if the government can prove that the suspect was aware he was being pursued?

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Michigan, Nevada, North Dakota, Ohio, South Carolina, South Dakota, Utah, Vermont, and Wyoming respectfully submit this brief as *amici curiae* in support of the Petitioner. There is a deep and longstanding split among the circuit and state courts regarding when exigent circumstances justify a warrantless residential search under the Fourth Amendment, resulting in an uneven application of individuals' Fourth Amendment rights. This is especially problematic where state courts and their regional circuits apply different tests, as is true in Kentucky. *Contrast* Pet. App. at 45a-46a (holding that in Kentucky, courts must first determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement" and then "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry") *with Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002) (finding that police do not impermissibly create exigent circumstances unless the court can find "deliberate conduct on the part of the police evincing an effort intentionally to evade the warrant requirement").

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief more than 10 days prior to the due date of this brief.

The *amici* states have substantial interests in both consistent application of Fourth Amendment rights to all citizens irrespective of jurisdiction and clear rules for police officers who encounter situations where evidence may be destroyed unless they take immediate action. The differing standards that are in place throughout the country put significant burdens on both law enforcement officers and citizens.

As Wayne R. LaFave notes, "[i]n deciding whether . . . to search for or seize property, the police are in actuality called upon to make decisions which are quite varied in their character and effect and which are influenced by a vast range of factors and considerations." Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 442-43 (1990). These factors include weighing the likely consequences of doing nothing—both in terms of the concrete potential for immediate danger to persons and property and in terms of addressing crime more abstractly—against the risks associated with multiple available tactics for talking to a suspect or securing evidence. Particularly because such split-second decisions are inherent in police work, officers and citizens alike deserve consistency in the application of the Fourth Amendment. Accordingly, the *amici* states have an interest in urging the Court to take this case to set forth a uniform national standard for analyzing exigent circumstances.

SUMMARY OF THE ARGUMENT

The question of when the potential destruction of evidence justifies a warrantless search is currently being decided in a highly disjointed manner across the country. The result is that individual Fourth Amendment rights depend on the jurisdiction. The Kentucky Supreme Court's decision below exacerbates existing lower-court conflicts regarding the exigent circumstances exceptions to the warrant requirement. It is time for the Court to step in to explain when the potential destruction of evidence justifies police action of entering a private residence without a warrant.

Furthermore, the Kentucky Supreme Court's determination that the exigent circumstances exception to the warrant requirement is unavailable where the exigency is a "reasonably foreseeable" result of lawful police action rewards criminals and essentially converts legitimate police inquiry into complicity in the destruction of evidence. The Court should grant the petition and reject this standard.

REASONS FOR GRANTING THE PETITION

I. Lower Courts are Fatally Split as to When Police Conduct "Creates" Exigent Circumstances and Thereby Precludes a Warrantless Search on That Basis

For over forty years, lower courts have been grappling with whether and when the exigent circumstances exception to the warrant requirement applies if police have arguably caused the exigency

by their own conduct. As more and more courts have considered the issue, a deeper and deeper conflict has developed among the federal courts of appeals and state high courts. Moreover, the conflict has yielded not merely *two* differing approaches to the exigent circumstances exception; rather, as the Petition explains, there are currently *five* different tests applied by the federal circuits alone. *See* Pet. at 9-19. State high courts have added their own Fourth Amendment approaches, some adopting tests applied by various circuits and others combining various aspects of different tests to create entirely new tests. *See* Pet. at 19-24. This degree of divergence demands resolution by this Court.

1. Lower-court inconsistency on this issue originates with the dearth of cases from this Court explaining when the destruction of evidence justifies a warrantless search. At least as far back as *Johnson v. United States*, 333 U.S. 10 (1948), the Court suggested that destruction of evidence may justify a warrantless search in some circumstances, affirming the suppression of evidence obtained from a warrantless hotel search because "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15. Similarly, in *McDonald v. United States*, the Court suppressed evidence obtained when police raided a hotel room after observing illegal lottery paraphernalia through a transom because the evidence was not "in the process of destruction." *McDonald. v. United States*, 335 U.S. 451, 455 (1948); *cf. United States v. Jeffers*, 342 U.S. 48, 52 (1951) (suppressing evidence obtained through a warrantless search of a hotel

room because the officers could have "easily prevented any . . . destruction or removal [of evidence] by merely guarding the door"). Yet these cases did not facilitate a uniform doctrine as to when destruction of evidence justifies a warrantless residential search.

Following the application of the exclusionary rule to state courts in *Mapp v. Ohio*, 367 U.S. 643 (1961), a plurality of the Court in *Ker v. California*, 374 U.S. 24, 40 (1963), affirmed a warrantless search based in part on officers' fears that evidence was about to be destroyed. In *Ker*, the plurality said that the officers' conduct in the "particular circumstances" of the case—including "the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed"—was reasonable. *Id.* at 40-41; *see also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (characterizing the *Ker* plurality as holding "that law enforcement officers may make a warrantless entry onto private property *** to prevent the imminent destruction of evidence . . ."). Not even the plurality, however, said definitively that imminent destruction of evidence justifies a warrantless residential search.

Then, in *Schmerber v. California*, 384 U.S. 757 (1966), the Court permitted a warrantless extraction of blood from a suspected drunk driver who was seeking medical treatment. The Court upheld the warrantless search on the theory that the body's relatively fast absorption and discharge of alcohol constituted the imminent destruction of evidence. *Id.* at 770-71. *Schmerber* thus provides what appears to be the first unambiguous use of the

imminent destruction of evidence as a rationale for an exception to the warrant requirement.

In *Vale v. Louisiana*, 399 U.S. 30, 33 (1970), however, the Court held that no exigent circumstances existed where police conducted an initial warrantless security sweep inside a home, sent for a warrant authorizing a more thorough search, but then searched the home without a warrant anyway once the residents returned. The mere possibility that the residents, fully apprised of the officers' presence and intention to search the home, might destroy evidence while police awaited a warrant was not enough to justify the search. *Id.* at 34-35. As the LaFave treatise has observed, "[g]iven the curious analysis in *Vale* it is to be hoped that it will not be the last word from the Court on this important issue." 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5 (4th ed. 2004).

2. Lower courts have understood these cases generally to bless an exigent circumstances exception to the warrant requirement—even for purposes of a residential search—where destruction of evidence is imminent. But without more detailed guidance as to the contours of that doctrine, the circuits and state high courts have splintered in their application of the exception. *See, e.g.*, *United States v. Coles*, 437 F.3d 361, 369 (3d Cir. 2006) (acknowledging that circuits "have adopted different inquiries for purposes of deciding whether police impermissibly create exigent circumstances"); *id.* at 372 (Roth, J., dissenting) (commenting on "conflicting Fifth and Second Circuit precedent").

The Petition sets forth details of the multivariate state and federal court tests, but it is worth stressing how long this issue has been around, and just how intractable it has become. More than twenty years ago, Professor Barbara Salken observed that when it comes to defining exigent circumstances involving destruction of evidence, "the Supreme Court has infrequently considered the question and has never provided a clear standard for determining when warrantless action is justified." Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Protect Destruction of Evidence: The Need for a Rule*, 39 Hastings L. J. 283, 288 (1988). Even then, "the courts of appeals ha[d] developed conflicting solutions to the problem." *Id.* (footnote omitted).

By 2003, lower court decisions had only grown more fragmented, leading one student to write that "the destruction of evidence exigent circumstance exception to the warrant requirement has created a great deal of confusion within the circuit courts of appeals." Geoffrey C. Sonntag, Note, *Probable Cause, Reasonable Suspicion, or Mere Speculation?: Holding Police to a Higher Standard in Destruction of Evidence Exigency Cases*, 42 Washburn L. J. 629, 656 (2003). In particular, Sonntag observed that lower courts disagree as to when police can be said to have created the exigent circumstances themselves—and thereby undermine reliance on the exception. *Id.* at 640.

An even more recent scholarly analysis calls attention to lower-court conflicts in so-called "knock and talk" situations, where police knock on suspects'

doors with the alleged purpose of prompting a search-justifying fracas. *See* Bryan M. Abramoske, Note, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U. L. Rev. 561, 563 (2008). Among other things, Abramoske marshals circuit decisions both for and against inquiring into an officer's subjective motivations when the issue is whether police themselves improperly created the exigent circumstances they use to justify a warrantless search. *Id.* at 571-79.

The conflicts exemplified in this case have been around for decades, but the Court has not yet attempted to explain when the imminent destruction of evidence can justify a warrantless search. Issues surrounding exigent circumstances determinations are not resolving themselves, and continued percolation only generates more and more layers of differences among courts.

3. Not only is the issue not going away, but it arises frequently. The *amici* states have been able to find scores of state and federal appellate opinions going back decades referencing exigent circumstances doctrine, nearly two-thirds of which were decided in the last twenty years.[2] That tally, of

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[2] *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Payton v. New York*, 445 U.S. 573 (1980); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Schmerber v. California*, 384 U.S. 757 (1966); *Ker v. California*, 374 U.S. 24 (1963) (plurality opinion); *United States v. Jeffers*, 342 U.S. 48 (1951); *Johnson v. United States*, 333 U.S. 10 (1948); *McDonald v. United States*, 335 U.S. 451 (1948); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008); *United*

States v. Gomez-Moreno, 479 F.3d 350 (5th Cir. 2007); *United States v. Collins*, 510 F.3d 697 (7th Cir. 2007); *Fisher v. City of San Jose*, 509 F.3d 952 (9th Cir. 2007); *United States v. Castro*, 225 F. App'x 755 (10th Cir. 2007) (unpublished opinion); *United States v. Coles*, 437 F.3d 361 (3d Cir. 2006); *United States v. Chambers*, 395 F.3d 563 (6th Cir. 2005); *United States v. Samboy*, 433 F.3d 154 (1st Cir. 2005); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004); *United States v. Flowers*, 336 F.3d 1222 (10th Cir. 2003); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002); *United States v. Ojeda*, 276 F.3d 486 (9th Cir. 2002); *United States v. Campbell*, 261 F.3d 628 (6th Cir. 2001); *United States v. Vega*, 221 F.3d 789 (5th Cir. 2000); *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996); *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996); *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995); *United States v. Rico*, 51 F.3d 495 (5th Cir. 1995); *United States v. Richard*, 994 F.2d 244 (5th Cir. 1993); *United States v. Lopez*, 937 F.2d 716 (2d Cir. 1991); *United States v. Templeman*, 938 F.2d 122 (8th Cir. 1991); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991); *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990); *United States v. Duchi*, 906 F.2d 1278 (8th Cir. 1990); *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988); *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir. 1988); *United States v. Aquino*, 836 F.2d 1268 (10th Cir. 1988); *United States v. Gallo-Roman*, 816 F.2d 76 (2d Cir. 1987); *United States v. Munoz-Guerra*, 788 F.2d 295 (5th Cir. 1986); *United States v. Collazo*, 732 F.2d 1200 (4th Cir. 1984); *United States v. Dowell*, 724 F.2d 599 (7th Cir. 1984); *United States v. Hultgren*, 713 F.2d 79 (5th Cir. 1983); *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981); *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1980); *United States v. Callabrass*, 607 F.2d 559 (2d Cir. 1979); *United States v. Curran*, 498 F.2d 30 (9th Cir. 1974); *United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973); *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *Mann v. State*, 161 S.W.3d 826 (Ark. 2004); *People v. Daughhetee*, 211 Cal. Rptr. 633 (Cal. Ct. App. 1985); *Shuey v. Superior Court*, 106 Cal. Rptr. 452 (Cal. Ct. App. 1973); *People v. Aarness*, 150 P.3d 1271 (Colo. 2006); *Hornblower v. State*, 351 So.2d 716 (Fla. 1977); *Alvarado v.*

course, does not include unappealed federal district court or state trial court opinions, or cases that would have presented exigent circumstances issues but were resolved prior to litigation, such as through plea bargains prompted by doubts about how courts would rule on the search.

The issue is sufficiently important that the LaFave Fourth Amendment treatise devotes an entire Subsection to it. 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.5 ("Warrantless Entry and Search for Evidence") (4th ed. 2004). LaFave summarizes the state of the law this way: "[I]t is closer to the truth to say that the emergency circumstances exception is 'established,' but it has not been 'well delineated.'" *Id.* at 393 (internal quotation omitted).

The deep well of appellate opinions discussing exigent circumstances issues proves LaFave's point. To be sure, it is generally accepted that imminent

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State, 466 So.2d 335 (Fla. Dist. Ct. App. 1985); *People v. Wilson*, 408 N.E.2d 988 (Ill. App. Ct. 1980); *Latham v. Sullivan*, 295 N.W.2d 472 (Iowa Ct. App. 1980); *State v. Schur*, 538 P.2d 689 (Kan. 1975); *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky. Ct. App. 2007); *Dunnuck v. State*, 786 A.2d 695 (Md. 2001); *Commonwealth v. Cataldo*, 868 N.E.2d 936 (Mass. App. Ct. 2007); *State v. Alaon*, 459 N.W.2d 325 (Minn. 1990); *Howe v. State*, 916 P.2d 153 (Nev. 1996); *State v. Santana*, 586 A.2d 77 (N.H. 1991); *State v. Wong*, 486 A.2d 262 (N.H. 1984); *State v. Hutchins*, 561 A.2d 1142 (N.J. 1989); *State v. Price*, 759 P.2d 1130 (Or. Ct. App. 1988); *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996); *State v. Carter*, 160 S.W.3d 526 (Tenn. 2005); *State v. Bender*, 724 N.W.2d 704 (Wis. Ct. App. 2006) (unpublished opinion).

destruction of evidence can justify a warrantless search, but no agreement exists as to prerequisites for, or limits to, applying that general principle. In reviewing the cases cited in the margin, one cannot even trace logical development of the doctrine over time. For example, circuit courts have gone from considering the pretextual motivations of police officers, *see United States v. Rubin*, 474 F.2d 262 (3d Cir. 1973), to eschewing such an inquiry, *see United States v. MacDonald*, 916 F.2d 766, 771 (2d Cir. 1990), and back again to looking at bad faith, *see United States v. Rico*, 51 F.3d 495, 502 (5th Cir. 1995), and then on to ignoring bad faith but considering foreseeability, *see United States v. Mowatt*, 513 F.3d 395, 400-03 (4th Cir. 2008).[3]

There is, in short, very little rhyme or reason to the development of lower-court approaches in this area of the law. The Court should step in and address when it is proper to search a residence without a warrant because, following a knock on the door, police could hear evidence being destroyed.

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[3] With regard to questions about the bad faith of police officers, it is worth noting that the decision below and the cases cited in the main text stand in tension with this Court's recent decision in *Brigham City v. Stuart*, 547 U.S. 398 (2006), which held that *all* individualized-suspicion Fourth Amendment inquiries—even exigent circumstances inquiries—depend exclusively on objective reasonableness, *not* on the subjective motivations of police officers. In this case, the Kentucky Supreme Court inquired whether the police acted with good-faith intentions, Pet. App. at 46a, but ultimately decided the case based on the objective foreseeability of the suspects' actions, *id.*

II. Blaming Police for the Foreseeable Illegal Actions of Others Cannot be the Proper Fourth Amendment Test

Among all the varying tests developed by the lower courts, the heart of the conflict appears to be whether courts look to the foreseeability of the actions of the suspect in light of police conduct. The Fourth and Eighth Circuits both consider foreseeability in their analyses, and the Kentucky Supreme Court adopted this approach as the second part of its test in the decision below. *See United States v. Mowatt*, 513 F.3d 395, 400-03 (4th Cir. 2008); *United States v. Duchi*, 906 F.2d 1278, 1284-85 (8th Cir. 1990); Pet. App. at 45a-46a.

In contrast, none of the various tests adopted by other circuits look to foreseeability as part of their analyses. Rather, other courts have adopted tests that consider whether there was unreasonable delay in obtaining a warrant (*see United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988); *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980)), whether there was unreasonable delay coupled with deliberate conduct in an attempt to evade the warrant requirement (*see Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002); *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir. 1995); *United States v. Carr*, 939 F.2d 1442, 1448 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506, 1511-13 (11th Cir. 1991); *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988)), whether there was bad faith and unreasonable police action (*see United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004); *United States v. Coles*, 437 F.3d 361, 368-69 (3d Cir.

2006)), and whether the police have acted in a lawful manner (*see United States v. MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990)).

A foreseeability inquiry will almost always doom an exigent circumstances search. It is nearly always foreseeable that a suspect will react illegally to legal police behavior such as a knock on the door. More specifically, any time drugs are in a house, it is foreseeable that residents of the house will become nervous when a police officer knocks at the door and might decide to flush or otherwise dispose of the drugs. Thus, any court that adopts a foreseeability inquiry as part of its test for determining whether the exigent circumstances exception applies will nearly always be at odds with courts who do not apply a foreseeability test.

Moreover, police officers will often fail a foreseeability test, resulting in many criminals going free because they chose to break additional laws when the police came knocking. Courts take the Fourth Amendment prohibitions against warrantless searches too far when they blame police officers for destruction of evidence by a suspect. The test set forth by the Kentucky Supreme Court in effect treats police officers as accessories to illegal destruction of evidence.

Instead of treating officers as catalysts for the destruction of evidence, "courts must show deference to the judgment exercised by a qualified professional. . . ." *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). If, as in *Youngberg*, the professional judgment of an administrator in a state hospital is entitled to

deference, surely "deference to professional judgment is likewise appropriate regarding police officials who . . . 'have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.'" LaFave, 89 Mich. L. Rev. at 505 (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 454 (1990)).

The Court should grant the Petition in order to resolve the conflict regarding whether and when the exigent circumstances exception should apply and, more specifically, whether the foreseeability that exigent circumstances may result from police conduct, or the subjective motivations of police officers, should be part of that inquiry.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

Respectfully submitted,

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Dated: May 21, 2010

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 12 2010
OFFICE OF THE CLERK

No. 09-1272

In The Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

JOINT APPENDIX

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Certiorari Granted September 28, 2010

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Opinion of the Kentucky Court of Appeals, March 14, 2008 ..... 12a

Opinion of the Kentucky Supreme Court, January 21, 2010 ..... 34a

RELEVANT DOCKET ENTRIES FOR THE FAYETTE COUNTY KENTUCKY CIRCUIT COURT

Date Filed	No.	Docket Text
11/21/2005	3	INDICTMENT; OTHER: HD-DEF.@ JAIL FCM-W.AHMAD
11/23/2005	6	ORDER SETTING TRIAL/ HEARING; OTHER: HD TO COM ATTY JAIL DC FCM TO AHM AD ARRG SET FOR 12/2/05 @ 1:00 PM
12/21/2005	11	ORDER OF ARRAIGNMENT – NOT GUILTY PLEA; FIRST CLASS MAIL: SH HELD ON 01-20-06 @1:00 PM FCM – MATTHEW BOYD
03/23/2006	22	VIDEO LOG: 22/3/06VCR-CD019
03/27/2006	24	ORDER STATUS HEARING; OTHER: SH 5/5/06 @ 1:00PM, DEFT MOTION FOR BOND RED. SUSTAINED, $75,000 @ 10% WITH CONDITIONS HD: CW, PRETRIAL, CLERK/FCM: HON MATTHEW BOYD
04/07/2006	25	MEMORANDUM: MEMORANDUM RESPONDING TO DEFT. MOTIONS TO SUPPRESS
04/21/2006	26	MEMORANDUM: DEFT KING'S MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

04/28/2006	27	RESPONSE: TO DEFTS MEMORANDUMS IN SUPPORT OF SUPPRESSION
05/01/2006	28	EXHIBIT LIST: FROM 3-23-06 SUPPRESSION HEARING
06/02/2006	35	OPINION AND ORDER; OTHER: FINDINGS OF FACT, CONCLUSIONS OF LAW HD: ROBERT S FRIEDMAN, KEITH EARDLEY, CW/FCM; MATTHEW BOYD
06/20/2006	38	ORDER DENYING; OTHER: MOTION TO RECONSIDER HD TO CW, DC, JAIL FCM TO MATT BOYD
07/21/2006	44	WAIVER OF FURTHER PROCEEDINGS
07/25/2006	45	JUDGMENT ON PLEA OF GUILTY; FIRST CLASS MAIL: HEARING SET 08-25-06 @ 1:00 PM CONDITIONAL GUILTY PLEA FCM-MATTHEW BOYD
08/29/2006	51	JUDGMENT/SENTENCE – PLEA OF GUILTY; OTHER: HD: CW, P & P, JAIL, SHERIFF/FCM: HON MATTHEW BOYD
09/22/2006	53	TENDERED DOCUMENT: FINAL JUDGMENT ENTERED 8/29/06
09/25/2006	54	NOTICE OF APPEAL: ON FINAL JUDGMENT FILED AND ENTERED 8/29/06 COPIES TO CW ATTY; ATTY GENERAL; COURT OF APPEALS; DPA

03/14/2008	64	OPINION: RENDERED ON 3-14-08 AFFIRMING FROM COURT OF APPEALS
12/12/2008	65	ORDER GRANTING: DISCRETIONARY REVIEW FROM SUPREME COURT
02/19/2010	67	FINAL FROM SUPREME COURT OF KENTUCKY; REVERSING AND REMANDING

RELEVANT DOCKET ENTRIES FOR THE KENTUCKY COURT OF APPEALS

Date Filed	No.	Docket Text
08/29/2006	1	CIRCUIT COURT JUDGMENT
09/25/2006	2	NOTICE OF APPEAL – CRIMINAL: IN FORMA PAUPERIS GRANTED AND DPA APPOINTED SEPT. 25, 2006
03/12/2007	12	TENDERED DOCUMENT: TENDERED APPELLANT BRIEF ON BEHALF OF HOLLIS DESHAUN KING. PLACED WITH MOTION. **DPA RETURNED 1 VOLUME RECORD, 1 VOLUME SUPPLEMENTAL RECORD, 1 VIDEO TAPE
07/23/2007	19	APPELLEE BRIEF FILED
08/07/2007	20	APPELLANT'S REPLY BRIEF: TIMELY FILED DOCUMENT PURSUANT TO CR 76.40(2)
08/10/2007	21	SUBMISSION
08/30/2007	22	APPEAL ASSIGNED ON THE MERITS: ASSIGNED MONTH: 11/2007 PRESIDING JUDGE: THOMPSON KELLY PANEL: 4 NOTE
10/10/2007	25	PROCEDURAL MOTION: APPELLEE'S MOTION FOR LEAVE OF COURT TO CITE ADDITIONAL AUTHORITY. (3 COPIES TO JS 1 COPY TO MZ)

10/10/2007	26	PROCEDURAL MOTION: APPELLEE'S MOTION TO DISPENSE WITH ORAL ARGUMENT (3 COPIES TO JS 1 COPY TO MZ) D/24
10/29/2007	29	ORDER GRANTING PROCEDURAL MOTION: COURT ORDERED DELIVERED GRANTING APPELLEE'S MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY AND MOTION TO DISPENSE WITH ORAL ARGUMENT. ORAL ARGUMENT SCHEDULED FOR NOVEMBER 8, 2007 IS HEREBY CANCELLED.
03/14/2008	38	OPINION – AFFIRMING: OPINION AFFIRMING THOMPSON HENRY (CONCURS) AND BUCKINGHAM (CONCURS) NOT TO BE PUBLISHED 20 PAGES
05/01/2008	40	DISC. REVIEW FILED KY SUPREME COURT: MOTION FOR DISCRETIONARY REVIEW FILED IN SUPREME COURT. 2008-SC-274-D
12/10/2008	41	DISC. REVIEW GRANTED BY SUPREME CT.: ORDER GRANTING MOTION FOR DISCRETIONARY REVIEW IN SUPREME COURT. 2008-SC-274-D
02/17/2010	45	FINALITY

RELEVANT DOCKET ENTRIES FOR THE KENTUCKY SUPREME COURT

Date Filed	No.	Docket Text
08/29/2006	1	JUDGMENT/ORIGINAL ACTION DATE: JD
05/01/2008	5	ORDER FOR EXTENSION OF TIME: OE: ORDER GRANTED MOVANT'S MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE ITS MOTION FOR DISCRETIONARY REVIEW AND THE HERETOFORE TENDERED MOTION FOR DISCRETIONARY REVIEW IS FILED.
05/01/2008	6	MOTION FOR DISCRETIONARY REVIEW (CRMN.): DR: COURT OF APPEALS' OPINION RENDERED MARCH 14, 2008; NP. (Due Date: 05/31/2008)
06/02/2008	7	RESPONSE TO MOTION FOR DISC. REVIEW: RS: RESPONDENT FILED RESPONSE TO MOTION FOR DISCRETIONARY REVIEW.
12/10/2008	10	ORDER GRANTING DISC. REVIEW: DG: (Due Date: 02/08/2009)
03/10/2009	23	ORDER – AS TO MOT. FOR ENLARGEMENT: OL: APPELLANT'S MOTIONS FOR EXTENSIONS OF TIME IN WHICH TO FILE HIS BRIEF AND TO PERFECT THE APPEAL IS GRANTED, AND THE

		HERETOFORE TENDERED BRIEF IS FILED.
05/08/2009	26	MISCELLANEOUS MOTIONS: MM: APPELLANT FILED BY COUNSEL, MOTION TO SUBSTITUTE HON. JAMESA DRAKE IN PLACE OF HON. LISA CLARE AS COUNSEL OF RECORD. (Due Date: 05/21/2009)
05/11/2009	27	APPELLEE BRIEF FILED: AB: APPELLEE BRIEF FILED WITH 1 CD. (1 VOLUME RECORD, 1 VOLUME SUPPLEMENTAL RECORD, 1 VIDEO TAPE COPY, RETURNED BY THE ATTORNEY GENERALS [sic] OFFICE) (Due Date 05/26/2009)
05/26/2009	30	APPELLANT'S REPLY BRIEF FILED: RB: APPELLANT'S BRIEF FILED
07/15/2009	33	SETTING ORAL ARGUMENT: BCORAL: ORDER SETTING ORAL ARGUMENT TO BE HEARD THURSDAY, SEPTEMBER 24, 2009, AT 10:00 A.M. FIFTEEN MINUTES ALLOTTED EACH SIDE FOR ARGUMENT. (Due Date 09/24/2009)
01/21/2010	34	OPINION – REVERSING & REMANDING: P4: BY JUSTICE SCHRODER. ALL SITTING. CUNNINGHAM, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE OPINION. *TO BE PUBLISHED* (Due Date 02/10/2010)

02/11/2010 35 FINALITY – PUBLICATION LETTER: FLPUBL

05-CR-1500-2 FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

HOLLIS KING, ET AL. DEFENDANTS

TRANSCRIPTION OF VIDEOTAPED HEARING
HELD BEFORE THE
HONORABLE JAMES D. ISHMAEL, JR.
ON MARCH 23, 2010

REPORTER: LISA MIGLIORE BLACK, CCR-KY

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ALSO PRESENT:
DAVID CAMPBELL

REPORTER'S NOTE: APPEARANCES NOTED MAY NOT REPRESENT THOSE PRESENT WHO DID NOT SPEAK ON THE RECORD.

[4] THE COURT: I'm early again. I'm sorry.

MS. WILLIAMS: Early is good.

THE COURT: Huh?

MS. WILLIAMS: Early is good.

THE COURT: Early is good.

(Inaudible.)

THE COURT: This is the matter of 05-CR-1500-001, Commonwealth versus Clarence Johnson.

Mr. Johnson is present represented by Mr. Robert Friedman.

-002 Commonwealth versus Hollis King – Mr. King is present, represented by Mr. Matthew Boyd.

And -003, Jamela Washington – Ms. Washington is present, represented by Mr. Keith Eardley.

The Commonwealth is present, Assistant Commonwealth Attorney, Andrea Williams.

This matter is assigned for hearing this morning on the defendants' motions to suppress. I have reviewed the record and am ready to proceed.

Does anybody have anything before we go ahead?

MS. WILLIAMS: Yes, Judge. First, I would just like to address the issue of standing. This is Ms. Washington's apartment, from what I understand. So the Commonwealth is going to assert [5] that Mr. Johnson and Mr. King may not have standing in this case to challenge the warrant of search of Ms. Washington's apartment.

THE COURT: Okay. I wasn't – I don't know any of the details when I get into something like this at this time. So that would – that would help me to kind of be on the heads-up.

Mr. Boyd?

MR. BOYD: With regard to Mr. King's standing, I think it probably would have been proper if the Commonwealth felt we didn't have standing to

file a motion, basically a response objecting to our standing in this case that cites the case law so that I could address it.

But just based on my knowledge of the case law, the case law says that if you have possessions within the home and you're a guest or invitee in the home, you do have standing, and my client does have that position, I believe.

THE COURT: Okay. Well, I certainly wouldn't – once we get into it, we'll see what the proof is. I don't know what the proof is other than what you-all have just told me. But if we get into it and the Court feels like that that is an issue, Mr. Boyd, then if you want to have that opportunity, [6] I'll certainly give you an opportunity to present something to me and – as well as the Commonwealth present arguments or cases, one way or another. And I'm sure Mr. Friedman would join in that, and I would also give you and your client that opportunity, Mr. Friedman.

MR. FRIEDMAN: Since the Commonwealth has made a record, I would like to make one briefly and point out that according to the law of premises, this man here is a licensee in that he's also got a right under the Fourth Amendment to be secure in his person from an unreasonable seizure.

THE COURT: Okay. All right. Are we ready to proceed, then?

MS. WILLIAMS: Yes, sir.

THE COURT: All right.

MS. WILLIAMS: Officer Cobb.

THE COURT: Officer, if you would come up, please, sir.

I'll ask you to raise your right hand, please. Do you swear or affirm the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Come up and have a seat. [7] Ms. Williams?

EXAMINATION

BY MS. WILLIAMS:

Q. Please state your name.

A. Officer Steven Cobb.

Q. How are you employed?

A. Lexington Division of Police.

Q. How long have you been a police officer with the Lexington Division of Police?

A. Approximately four and a half years.

Q. What is your position at the police department?

A. I'm a patrol officer on the E sector, special assignment squad.

Q. Could you please describe, one, where the E sector is?

A. Where E sector is?

Q. Yes. What does it include?

A. Outside of New Circle Road from Nicholasville Road, around the county to Broadway, most everything that's outside of New Circle to the county line.

Q. And what does the special assignment [8] squad do?

A. Particularly impact part one crimes in the sector, including any hot spots or areas that the captain wants us to go to, including narcotics complaints.

Q. So your – the captain tells you where to go each night, looking for hot spots?

A. Correct, and our lieutenant.

Q. Okay. Were you on duty on Thursday, October 13th, 2005?

A. Yes, ma'am, I was.

Q. What were you doing on that night? What was your assignment on that night?

A. We were assisting narcotics that night with a buy bust operation.

Q. What is a buy bust operation?

A. Buy bust operation uses a confidential informant to make buys from street-level narcotics dealers.

Q. Where were you-all conducting this buy bust on – on October 13th?

A. At that time, we were on Centre Parkway in the area of –

Q. I'm sorry.

A. – area of the 1300 block of Centre [9] Parkway.

Q. Where is Centre Parkway?

A. Centre Parkway is located off of the (inaudible) area in the Gainesway neighborhood area.

Q. And where were you positioned on that night?

A. That night, I was on – right off of Centre Parkway. I think it was on Bold Bidder. I think that's where I was actually positioned at.

Q. Now, were you involved with a confidential informant that night?

A. Was –

Q. Well, did you have contact with the confidential informant?

A. Not other than the briefing, no.

Q. What is – what was your role there on October 13th? What was your role that night?

A. I'm a uniformed presence officer that responds after the – after the deal has been made and we move in to make the arrest, that's – that's what my job is.

Q. So how do you keep contact with those that are directly involved in the deal?

A. There are plain-clothes officers and detectives that maintain contact and communications [10] with the uniform and the situation that goes – they are all in unmarked vehicles.

Q. Do you have radio contact with these people?

A. Yes, ma'am, we do.

Q. Okay. Do those plain-clothes detectives and officers tell you where to sit, or do you just –

A. No –

Q. – make that judgment yourself?

A. – usually, the responding officers get in a place in the area that they can respond in a timely manner.

Q. So you decide that for yourself?

A. Yes, ma'am.

Q. Okay. Were you told to respond after a drug deal had been – had been made on that night?

A. Yes, ma'am.

Q. Who decides what you did?

A. It was about 9:50 p.m. at night. We were in the area of the 1300 block of Centre Parkway. By the radio, we had been informed the informant had been approached outside of 1301 Centre Parkway by a subject.

The subject had gotten inside of a vehicle with [11] the informant, and they had gone to an – the suspect had gotten out of the truck again and gone to an apartment in the 1301 Centre Parkway – the apartment building.

However, from the radio traffic, the way I understood it, he wasn't able to find whatever he was looking for, so the informant came back to the vehicle.

The vehicle then went to the parking lot of 1317 Centre Parkway, parked, and Officer Gibbons at that point was in visual contact with what was going on.

By the radio, because of the units – (inaudible) I could tell a little bit about the conversation that was going on. The deal was made between the informant and the suspect. The suspect entered the breezeway at 1317 and came back. The informant received the contraband at that time. He gave the go signal over the radio.

Officer Gibbons radioed back with the fact that the deal had been made because he's closer – because of the nature of the equipment, it's – there's a better signal the closer you are. He told us where he was at, gave us a description of the suspect, where the suspect was going, and which [12] breezeway he was going into.

At that point, we began to move into the area.

Q. What did he describe the suspect was wearing?

A. He described the suspect as a male, black, with a – I want to say it was a red sweatshirt – red sweatshirt, jeans, and tennis shoes.

Q. Okay. So – and where did Officer Gibbons say that this person went, the guy in the red sweatshirt?

A. He said he had gone into the breezeway at 1317, the apartment building – the 70 series of apartments, and the exact number of the apartments in that breezeway, I'm not sure. But I want to say it's the third breezeway on the right when you enter the lower parking lot of 1317.

Q. Did Officer Gibbons – Gibbons give a radio signal as to which apartment he thought he entered?

A. He kept describing as we were going in, just because of the time that it took for the informant – for the suspect to get out of the truck and enter the breezeway – was a little bit faster than what he had

anticipated, so by the time we were [13] coming up in there, he was already entering the breezeway as we approached. So he was trying to explain to us to, you know, hurry up and get there, he was entering the breezeway, to keep him from going into an apartment.

Q. Did Officer Gibbons say anything about a right apartment?

A. Where the suspect went? Officer Gibbons had visual contact with him. He said – as we came into the parking lot, he said he was going into the back right apartment.

Q. Now, this is all happening very quickly?

A. Correct.

Q. Okay. So Officer Gibbons gives you the signal to go?

A. Correct.

Q. And he's running – the guy in the red sweatshirt is running into the breezeway?

A. Correct.

Q. Okay. And Officer Gibbons said something about a right apartment?

A. Correct.

Q. Okay. What did you do once you got that signal to go?

A. As soon as we – as soon as we heard the [14] deal about – the informant gives the go signal, we start to move in at that point, and we're trying to get there as quickly as possible.

He gives additional direction – Officer Gibbons gives additional direction as to where he's going and everything as we enter the parking lot.

As we were entering the parking lot, we were exiting our vehicles as he was telling us exactly – the exact apartment he was going to at that point, and I believe myself and two narcotics units, Detective Maynard and Sergeant Simmons, were arriving on the scene at the same time.

Q. Okay. And once you-all got there, what did you do?

A. I exited my vehicle and ran into the breezeway.

Q. Okay. And what did you do once you got into the breezeway?

A. As I came up into the breezeway, Detective Maynard and Sergeant Simmons were right next to me. Detective Maynard came – we came down the hallway. As we did – as I came up into the breezeway, where I could make eye contact with the back apartment, we could hear a door shut. Detective Maynard heard the same thing as he [15] entered.

As we got into the hallway, about midway, there was a very strong odor of burnt marijuana inside the breezeway.

As we got closer to the back left apartment, we could tell that it seemed to be the source of that, almost as if the door had been slammed right there.

Detective Maynard made contact with the door, announced our presence, banged on the door as loud as we could, announced, "Police, police, police." I had reason to believe –

Q. Let me stop you right there.

Where did you smell the burnt marijuana smell coming from? Which apartment?

A. The back left apartment.

Q. So the back left apartment?

A. Correct.

Q. What apartment door did you hear shut, or what apartment door did you think you heard shut?

A. I don't know.

DEFENSE COUNSEL: (Inaudible) calls for speculation.

THE COURT: If the officer knows. You say you don't know?

THE WITNESS: No, I don't know.

[16] BY MS. WILLIAMS:

Q. Okay. So you don't know – you just heard an apartment door shut?

A. Correct.

Q. Okay. And then you smelled burnt marijuana?

A. Correct.

Q. How do you know it was burnt marijuana?

A. Through training and experience.

Q. Okay. Now – and then you and Officer Maynard approached which apartment door?

A. Number 78.

Q. And is that on the left or the right?

A. The left, the back left –

Q. Okay.

A. – coming from the parking lot.

Q. Okay. And what did you-all do once you approached Apartment Number 78?

A. Announced our presence at the door.

Q. How did you do that?

A. Detective Maynard banged on the door, said, "This is the police."

Q. What did you observe or hear when you-all banged on that door?

A. As soon as we started banging on the [17] door, Detective Maynard turned to Sergeant Simmons to let him know that we could hear people inside moving. It sounded as – things were being moved inside the apartment. We had obviously felt at that point that someone had just gone into the apartment. So . . .

Q. What kind of movement did you hear inside?

A. Things were being moved around inside the apartment.

Q. What did you-all do once you heard these things being moved around in the apartment?

A. We knew that that there was possibly something that was going to be destroyed inside the apartment.

At that point, Detective Maynard, with the – Sergeant Simmons – and we explained to them we were going to make entry inside the apartment. Detective Maynard attempted to get the – to go – to enter through the door, wasn't able to, and that's when I entered through the door.

Q. Why did you think something could be destroyed in the apartment?

A. Just based upon the nature of what it is we were there for. Crack cocaine can easily be [18] destroyed because of its size.

Q. Okay. So you entered the apartment. How did you enter the apartment?

A. I kicked the door open.

Q. Okay. What happened once you kicked the door open?

A. We kicked the door open, and I entered. At that point, I think it was Detective Maynard that was behind me. Other officers had arrived. I believe it was Officer Luby and Officer Murdock followed inside, along with Sergeant Simmons.

We did an initial protective sweep of the area, also looking for the suspect that had been described. As we entered, there were three subjects in the front room, the living room, of the apartment. One of those was smoking marijuana at the time.

We did a sweep of the other two rooms inside the apartment, came back out. As we did, in plain view, there was a sizable amount of narcotics inside the apartment. Everyone was detained at that point and Mirandized inside the apartment.

Q. Okay. You said three people were in the apartment.

A. Correct.

[19] Q. Where were those three people sitting, standing? What were those three people doing?

A. I want to say there were three couches inside the front room: one couch that divided the kitchen/

dining room area. One was against the front wall that faced the breezeway. Another was against the back wall, faced the outside of the apartment building.

Mr. Johnson was on the right-hand side sitting on the couch closest to the breezeway. Mr. King was over to the right-hand side in front of one of the couches, and I believe Ms. Washington was next to the other couch, maybe towards the entertainment center, as I entered.

Q. Okay. You said somebody was smoking marijuana. Who was –

A. Yeah.

Q. – that?

A. Mr. Johnson.

Q. Now, you said you did a protective sweep of the apartment.

How do you do that?

A. We check each room for places that someone could still be inside the apartment.

Q. Did you find anyone?

[20] A. No, ma'am, we didn't.

Q. And you said as you were doing that protective sweep – sweep, in plain view, there was suspected narcotics?

A. Correct. On the coffee table there in the middle of those couches, there was approximately 25 grams of suspected marijuana. Also, as we came back through, sitting on the counter in the kitchen was probably 4.6 ounces of suspected powder cocaine.

Q. Okay. Now, after you saw these drugs in plain view, what did you do at that point?

A. All the persons at that point were detained.

Q. How were they detained?

A. They were handcuffed.

Q. Okay. And why were they handcuffed?

A. Due to the nature of what was found inside the apartment so we can continue the investigation.

Q. What was done at that point after each of the three suspects were placed in handcuffs?

A. They were Mirandized.

Q. Okay. And what happened after that point, after they were Mirandized?

A. The scene was secured, and then we [21] start – we start field interviews inside the apartment.

Q. How was the scene secured?

A. We just made sure that – that obviously there's no other – part of the protective sweep to make sure there's no other people in there and also to make sure that we check each person in there to

make sure there's no weapons around where the persons are.

Q. After you checked the area around to make sure there was no weapons, what did you do at that point?

A. Started the field interviews on the subjects.

Q. Is that just talking to them?

A. Correct.

Q. Okay. Did any of them make any statements?

A. Sergeant Simmons talked to Ms. Washington at the scene. At that – initially, she took responsibility for all the narcotics in the apartment. However, there was quite a bit of eye contact between her and Mr. King during the – during – what was transpiring between them.

Sergeant Simmons moved her to the back part of [22] the apartment so he could talk to her to keep any influence from Mr. King from what he was – what he was trying to talk to her about.

Q. Did Mr. King make any statement?

A. Officer Luby tried to interview him. However, he refused to answer any questions about what was found inside the apartment. He did, however, say that Ms. Washington was his girlfriend, and one of the childrens (phonetic) that stayed – children that stayed in the apartment was his.

Q. No kids were there that night?

A. Correct. I think Ms. Washington said they were with her mother.

Q. Okay. Did Mr. Johnson make any statements?

A. He did. I interviewed him. He said that he had just been in the apartment to get high and that he had been smoking weed in the apartment. He said he had been in prison for quite a bit of time. He did not want to go back. When I asked him about where the drugs had come from, he said they weren't his and wouldn't elaborate.

Q. Okay. What happened after that point, after you-all spoke to each of the three people in the apartment?

[23] A. I (inaudible) what was found inside the apartment. We did an additional search for further contraband.

Q. Okay. So did you find any other items in the apartment?

A. We did. In the back, Detective Maynard found two additional marijuana pipes and 0.6 grams of suspected crack cocaine on the dresser, a marijuana roach, additional 2.3 grams of suspected crack cocaine also in the back right bedroom.

Officer Murdock located digital scales with cocaine residue and other pieces of drug paraphernalia in the kitchen.

Sergeant Simmons found $2,500 in the back right bedroom in a shoe hanging on the wall, and also found on the coffee table were three cell phones and an ashtray with approximately six grams of marijuana roaches.

Q. And as you found those items, what happened at that point?

A. All three suspects were charged with trafficking controlled substance, first cocaine, and trafficking marijuana.

Q. Okay. And then were they taken to jail?

A. Yes, ma'am.

[24] MS. WILLIAMS: I don't have any further questions at this point.

THE COURT: It doesn't make any difference to me what order you-all go in. We can go according to the indictment or alphabetical order or whomever can – wants to jump up.

DEFENSE COUNSEL: Mr. Boyd, would you like to?

EXAMINATION

BY MR. EARDLEY:

Q. Officer Cobb, I believe Mr. Boyd is going to show you some pictures of the scene, but before he does so, let me just ask you generally about the layout.

A. Yes, sir.

Q. I'm going to ask you some questions about the layout, and you tell me if this is correct.

Now, Building 1317 and Building 1333 are across the parking lot, correct?

A. Correct. Now, it's my understanding – my experience – 1333 is the top complexes. Now, if that apartment complex is part of 1333, that – that parking lot that we go into is known to me as 1317 [25] Centre Parkway.

Q. Okay. As you look down the breezeway of 1333, at the end of the breezeway, Apartment Number 78 is on the left, correct?

A. Yes, sir.

Q. And Apartment Number 79 is on the right?

A. Correct.

Q. Now, Officer Gibbons reported that he saw the suspect – the suspect being the fellow who spoke with the confidential informant – run into the back right apartment, correct?

A. Yes, sir.

Q. And that would have been Apartment 79?

A. Correct.

Q. But the apartment we're talking about here is Apartment 78, which is the apartment across the hall?

A. Correct.

Q. So the apartment that these three people were in was not the apartment that the suspect ran into, correct?

A. Correct.

Q. Okay. You say you were about halfway down the breezeway when you smelled marijuana?

A. I would say so.

[26] Q. Okay. You heard a door open and close, but you weren't sure which one that was?

A. Correct.

Q. You knocked on the door to 78 and didn't get an answer? You just heard something inside?

A. Correct.

Q. And then you forced entry, correct?

A. Correct.

Q. Okay. And shortly after this or contemporaneously with this, the police also forced entry into the apartment across the hall at that time, correct?

A. Yes, sir, they did.

Q. And the suspect that you were initially looking for was found, correct?

A. Yes, sir, they were.

MR. EARDLEY: Okay. Thanks, that's all I have.

MR. BOYD: May I approach the witness? I need to show this witness these photographs.

THE COURT: Yeah.

[27] EXAMINATION

BY MR. BOYD:

Q. Officer Cobb, my name is Matthew Boyd. I represent Mr. King. I want to ask you a few questions about the report that you wrote. I notice that on the front page of the report, you noted the entry method, and you put "no force."

Can you please explain to me why you put "no force," when you kicked the door in?

A. That had – that has to do with the crime that occurs, not with anything that happens to the residence.

Q. Okay. So the method of entry, that's not talking about how you entered the apartment?

A. Correct.

Q. Okay. Based on – you completed a supplemental report; is that correct?

A. Correct – well –

Q. A Lexington Division of Police case report?

A. Correct. This supplemental report is actually the narrative to this report.

Q. Okay. And that was – this has got your name at the very bottom of it –

[28] A. Correct.

Q. – (inaudible).

Okay. So this was information that you gathered after you had taken these three defendants to jail, and then you completed this report; is that correct?

A. Yes, sir.

Q. Okay. And you've already admitted to Mr. Eardley that Officer Gibbons, who was the one closer to the scene, informed you that he visually saw the suspect run into Apartment 78; is that correct?

A. He radioed that, yes, sir.

Q. Okay. I'm going to show you some photographs.

MS. WILLIAMS: (Inaudible).

BY MR. BOYD:

Q. I'm sorry. They saw him going to the back right – back right, Apartment 79?

A. Yes, sir.

Q. Okay. This is a photograph. Can you tell me what that looks like to you? Is that the second breezeway at 1317?

A. Yes.

Q. Okay. And this – is this a view of the [29] 1317 or 1333, where they entered the breezeway that you entered?

A. I believe so, yes.

MR. BOYD: Okay. Judge, I move to have these marked continuously as Defense Exhibit 1 and 2 and then as we go along.

THE COURT: Ms. Williams?

MS. WILLIAMS: No objection.

THE COURT: They will be admitted without objection.

(DEFENSE EXHIBITS 1 AND 2 WERE MARKED FOR IDENTIFICATION AND ADMITTED INTO EVIDENCE.)

BY MR. BOYD:

Q. The – Mr. Eardley and I took these photos. This is the – you see the entry to 1333, the breezeway that we're discussing here?

A. Yes, sir.

Q. – that's the subject of it?

This is that breezeway; is that correct?

A. Yes, sir.

Q. Okay. That's Defense Exhibit 3.

Mr. Eardley has entered – it looks like he's entering up the breezeway here, right?

A. Yes, sir.

Q. Can you see in that – from outside the [30] breezeway either one of the apartments with the numbers on them?

A. No, sir.

Q. Is it true that there's an opening back here where light is penetrating and that would have been in front of the apartment on the right-hand side, Apartment 79 (inaudible)?

A. It's the same kind of opening on the back as it is in the front.

Q. Okay. Let me see if I can show you a little bit more of what I'm saying.

On the right-hand side, as you see in this photograph that I'm going to have – Defense Exhibit 4, on the right-hand apartment, there's an opening here.

A. Correct.

Q. On the left-hand apartment, where you can barely see Mr. Eardley, there's not a light that would allow you to see a person entering into the left-hand apartment. Is that – does that seem a fair statement?

A. That is during the day.

Q. Okay. This was at nighttime?

A. Correct.

Q. There are lights out there, right?

[31] A. Correct.

Q. So the lights that are shining back here are going to be shining in this area, maybe not the same as daylight, but at least there is going to be visual lighting there; is that correct?

A. Correct. The hallway is lit.

Q. The hallway is actually lit up at nighttime?

A. Yes.

Q. Okay. Is this the – well, let me go through – that's – we've got 4 here, and I want to keep them in order.

This is a photograph (inaudible). This is a photograph of Mr. Eardley standing outside of Apartment Number 78, which is the apartment that the defendants were in; is that correct?

A. That's –

Q. (Inaudible)?

A. (Inaudible). Yes.

Q. And that apartment, Number 78, is on the left-hand side, correct?

A. Correct.

Q. Okay. And we have a photograph here of Apartment 79, which is the apartment on the right that Officer Gibbons said the suspect went into; is [32] that correct?

A. Correct.

Q. This is an open area above that. Do you recognize that? 79 is right here, and these are the stairwell – the stairwell that comes back up. Does that look familiar to you?

A. That's consistent with being on the second level. I didn't go upstairs that night.

Q. Okay. I want to ask you, in this photograph, can you identify on the wall what this is?

A. What the sign says?

Q. Yes, sir.

A. "Guests only. No trespassing. No loitering. No congregating."

Q. Does that indicate that they probably had a problem with people standing outside the apartments?

A. Yes.

Q. And if people were standing outside the apartment, how can you know if the marijuana smell that you smelt was coming from inside an apartment or had been someone that had dispersed when they

saw uniformed police officers arrive? How can you make that determination?

[33] A. It gets stronger as you get towards the source of the marijuana.

Q. Okay. And is it likely that if he – if Officer Gibbons, who had visual contact, said that the suspect went into the right that the person that you were looking for wasn't in Apartment 79; they were in Apartment – Apartment 78 – they were in Apartment 79 to the right?

A. Is it possible?

Q. No, is it more – is it more likely than not? I mean, he gave you instruction that he was in the right-hand apartment, correct?

A. Correct.

Q. And the basis for you being there was pursuing this suspect from this buy bust, correct?

A. Correct.

Q. It wasn't because there was an odor of marijuana in the hallway or anything like that?

A. No, there wasn't.

MR. BOYD: Okay. I move to introduce these exhibits.

THE COURT: Any objection to the rest of them, Ms. Williams?

MS. WILLIAMS: No, sir.

THE COURT: Let them all be introduced.

[34] Do you have marks on them which ones are which?

MR. BOYD: I've just got them in order as I introduced them, Judge.

THE COURT: Okay. Well, time-out a minute. Let's get them marked so we'll have them.

MR. BOYD: (Inaudible).

THE COURT: We'll just mark them 1 through how many ever there are.

(EXHIBITS 3 AND 4 WERE MARKED FOR IDENTIFICATION AND ADMITTED INTO EVIDENCE.)

BY MR. BOYD:

Q. What was your basis for believing you could enter the apartment that these defendants were in?

A. There was a crime occurring inside and also possible destruction of evidence.

Q. And isn't it true that you actually wrote in your report that "We could hear persons inside the apartment and noises possibly consistent" – is that right – "possibly consistent with the destruction of potential evidence"?

A. Yes, I wrote "possibly consistent with destruction of potential evidence."

Q. You've testified previously to Ms. Williams that there was movement.

[35] What is it about that movement that was unique to allow you to discern that that was possibly consistent with destruction of physical evidence?

A. It's consistent with my experience of people who do destroy evidence inside apartments or other structures when we're outside.

Q. Is it consistent with your experience that people who live in apartments move around in them?

A. Do people move in apartments?

Q. Sure.

A. Yes, people move in apartments.

Q. (Inaudible) regularly that don't commit crimes move around in their apartment?

A. Most people answer the door when the police knock at the door also.

Q. That wasn't really what I asked. I was asking you if it's common, in your experience, that people move around in their apartment, and I'm asking you – you said that you have expertise that says it's consistent or possibly consistent –

A. I said I had experience.

Q. Okay. I'm asking you what that experience is that made you be able to discern between possibly consistent with destruction of [36] evidence and normal use of an apartment?

A. What is the difference?

Q. Yes, sir.

A. Between movement you can hear inside? We announced our presence at the door, told them we were police, and after that, it's been through my experience, when we've made that – when we've done that before, we have had people who have destroyed evidence inside, it's the same kind of movements we've heard inside.

Q. I've heard you mention the concern you had was destruction of crack cocaine.

You would have had knowledge that the suspect who made the buy bust was not in that apartment, and the only thing you had smelled was marijuana. So why is it that you thought that maybe they were destroying cocaine?

What indication did you have whatsoever that there was any cocaine within Apartment 79 prior to you kicking the door in forcibly?

A. That's what was heard over the radio.

Q. You heard over the radio that the suspect was in the back right apartment?

A. No. Actually, that's not what – that's not what I heard. That's what was radioed over the [37] radio.

MR. BOYD: Let me bring your report – Judge, if I could approach again. Ms. Williams, I'm on page seven.

MS. WILLIAMS: Okay. Which paragraph, Mr. Boyd?

MR. BOYD: The first paragraph of the (inaudible) sentence.

MS. WILLIAMS: Okay.

BY MR. BOYD:

Q. Could you read the third sentence of this report that you prepared immediately after this –

A. The third sentence or the third line?

Q. The third sentence.

A. "Officer Gibbons radioed to the other units for us to move in, and as we did, he saw the suspect going towards the back apartment."

Q. Okay. Can you read the next sentence?

A. "Officer Gibbons saw the suspect go into the back right apartment."

Q. And you testified that you were receiving this information over the radio. So –

A. Correct.

Q. – if Officer Gibbons radioed that he [38] was in the back right apartment, the information you had was that the person that was fleeing from the police was in the back right, correct?

A. Yes and no.

Q. Okay. Tell me how it's no.

A. It was radioed, but that's not what was – that's not what got through to us because – we were getting outside of our vehicles as that was being radioed.

Q. How did you manage to get this in your report immediately afterwards if you weren't aware of it?

A. I talked to Officer Gibbons.

Q. And you now learn that you smelled – you think that gave probable cause to enter the apartment?

A. Yes, sir, I do.

Q. Because that's a felony, the smell of marijuana? You knew that there were more than eight ounces, or how did you know that it was a felony amount in there?

A. Destruction of evidence is.

Q. You were – so now your testimony is that you weren't aware that the suspect was entering – had entered the right apartment?

[39] A. I wasn't aware?

Q. That's what I'm asking you.

A. No, I had reason to believe he had entered the buy bust apartment, but due to radio traffic I know – I know that wasn't what he radioed, but that's not what – I didn't go into that breezeway with the understanding that he went into the back right apartment.

Q. Is it fair to say you didn't have visual (inaudible) suspect who was fleeing from Officer Gibbons?

A. Did I have visual contact? No. I never had visual contact.

Q. So you never had continuous – you never saw the suspect?

A. No.

Q. Okay. And you were just basing your entry on the odor of marijuana?

A. No, destruction of evidence inside the apartment.

MR. BOYD: (Inaudible) accept that answer. I don't think I have any more questions.

[40] EXAMINATION

BY MR. FRIEDMAN:

Q. Officer Cobb, you said it's your experience that most people answer the door if the police knock and say they are police, correct?

A. Correct.

Q. But you would concede, would you not, that no one has any legal obligation to open the door no matter who is knocking?

A. Correct.

Q. Okay. And I think you did answer Mr. Boyd that people do move around inside apartments?

A. Yes, people move in apartments.

Q. Okay. And that includes guests and residents?

A. Yes, sir.

Q. Okay. So if I understand the clarification to your testimony that you just gave, you and a couple of detectives went crashing down the breezeway, tried to follow your nose, heard some movement inside of an apartment, thought that crack cocaine was being destroyed, and busted down the door. Is that a summary?

[41] A. Thought evidence was being destroyed, yes.

Q. Well, it's not crack cocaine, which is what you originally said, but what evidence?

A. Any evidence of a crime.

Q. What evidence in particular, sir?

A. Narcotics.

Q. Okay. You don't know what kind of narcotics; you just thought that there were drugs being destroyed because you heard things moving around?

A. Based on the radio traffic, I had reason to believe it was crack cocaine because of the smell inside the apartment – the breezeway at that point, I had reason to believe it was also marijuana.

Q. How far apart are the doors in the breezeway?

A. I'd estimate maybe 10, 12 feet.

Q. Okay. Was there any wind or breeze whatsoever blowing that evening?

A. I don't remember.

Q. Okay. And I think we've already touched on the fact that there had been problems of people loitering right there, which caused signs to go up?

A. Right there in that specific –

[42] Q. Right there in that breezeway.

A. I can't testify to that.

Q. You did earlier, didn't you?

A. There was a sign on the – each building over there that says no loitering or trespassing.

Q. You're familiar with that area of town, aren't you?

A. Yes, sir, I am.

Q. Isn't it the case that those signs go up when there's been some kind of loitering problem?

A. Not always. A lot of HUD property has those signs from the get-go anyhow.

Q. Just – just for the heck of it?

A. Yes.

Q. Okay. And you don't know if people were out there loitering before the police came by and dispersed or not?

A. No, sir, I don't.

Q. Okay. I mean, you didn't have any drug dogs to provide a little more reliable tracking of the smell, did you?

A. There was – there was actually an officer with the drug dog with us, but, no, he was not the first to respond.

Q. Okay. It's not the dog that led you to [43] the apartment you went into?

A. No, we didn't follow a dog.

Q. Okay. Okay. And when you decided to bust down the door, of course, you had no visual contact with any contraband whatever?

A. Correct.

Q. Okay. And when you got inside, did you discover any uncontrovertible evidence of anything having been moved around?

A. Yeah, there were – there were things on the table in the middle that looked like they had recently been moved.

Q. How could you tell, sir?

A. The baggie that was found was behind a picture frame inside the apartment.

Q. Okay. Now, wait a minute. That was on the table?

A. Coffee table, yes.

Q. Okay. And there was a picture frame on the coffee table?

A. From what I remember, yes, sir.

Q. Okay. And there was one baggie that happened to be behind it?

A. Correct.

Q. Okay. Do you recall what that picture [44] was of?

A. No, I don't.

Q. Okay. Well, the baggie wasn't underneath a lying-down picture frame, was it?

A. No, not from what I remember.

Q. Okay. It was just in proximity to the picture frame?

A. Correct.

Q. Okay. Up there on the surface of the coffee table, correct?

A. Correct.

Q. Okay. And you didn't find any cocaine or paraphernalia other than a roach on Mr. Johnson here, did you?

A. Correct, but there was also – when he was transported to the jail, he had been questioned about if he had anything else on him.

MR. FRIEDMAN: I would object to that. That charge has been dismissed by the grand jury.

THE WITNESS: What charge is that?

MR. FRIEDMAN: There was a promoting contraband charge?

MS. WILLIAMS: It's still – (inaudible)

MR. FRIEDMAN: (Inaudible).

[45] MS. WILLIAMS: – the indictment?

MR. FRIEDMAN: It is? Oh, my mistake.

THE WITNESS: There was a crack pipe in his shoe.

MR. FRIEDMAN: Oh, okay.

BY MR. FRIEDMAN:

Q. (Inaudible) not suggest to me that he had (inaudible) –

A. Correct, correct.

Q. – in his shoe?

Okay. And you-all did find the suspect in the other apartment?

A. Yes, sir, we did.

Q. And he has been charged with trafficking?

A. Yes, sir, he was charged at the scene.

Q. Okay. Do you happen to know whether that case has been disposed of?

A. Its been dismissed.

Q. It's been dismissed?

A. Yes, sir.

MR. FRIEDMAN: Okay. I think that's all I have.

THE COURT: Anything further, Ms. Williams?

[46] MS. WILLIAMS: No, sir.

THE COURT: Anything further, Mr. Eardley or Mr. Boyd?

EXAMINATION

BY MR. EARDLEY:

Q. One follow-up, Officer Cobb. I think there might be a little bit of confusion regarding the layout of the apartment in this breezeway.

(Inaudible) Apartment 79 on the right, where the real suspect was found (inaudible), correct?

A. The suspect in the initial crime?

Q. Yes, sir.

A. Yes.

Q. Okay. And the distance between 78, 79 is –

A. (Inaudible).

Q. – the same distance from here to the end of this table; is that correct?

A. No. It's not from here to the end of that table, no. That's not the distance.

Q. (Inaudible) from 78 to 79?

A. No.

Q. How far is it?

[47] A. Again, I estimate 10, 12 feet, but, obviously – I mean, there's pictures.

Q. Let me approach and take a look at the pictures again (inaudible).

A. On the last picture –

Q. Yeah.

A. – (inaudible).

Q. Let me get the best one here. Yeah, let's use this one, which gives us – the distance between the two apartments is the width of the breezeway –

A. Correct.

Q. – is that correct?

And it looks like it's maybe about as – the distance is about the same as my height; is that correct? That's me in the picture.

A. Maybe a little bit more.

Q. Okay. And then there's two other apartments, but they are –

A. At the front – at the front of the complex.

Q. (Inaudible)?

A. Correct.

Q. Were there two at the front, two in the back, and then we're estimating a little over six [48] feet between the apartments directly across from each other, correct?

A. Correct. Usually the steps are at about four feet, and you're looking at the exact same on the other side, so you're looking at around eight to 10 feet in between the doors.

MR. EARDLEY: Thank you, Officer.

THE WITNESS: You're welcome.

THE COURT: Mr. Boyd?

MR. BOYD: Thank you, Your Honor.

EXAMINATION

BY MR. BOYD:

Q. Officer Cobb, you had indicated in your supplemental report that we've been going over that there was a HUD report filed.

Did you – did you create that HUD report?

A. I don't know if I completed the HUD incident report or Officer Murdock did.

Q. And so either you or Officer Murdock would have?

A. (Inaudible).

Q. Where would the information that's contained had been retrieved from?

[49] A. From this report.

Q. Okay. And you've sworn under oath today that when you got midway through the apartment

breezeway there that you smelled marijuana; is that correct?

A. Correct.

Q. I'm going to read you the sentence from this HUD property report that says, "Upon entering the threshold of Apartment 78, officers were overwhelmed by the strong odor of burning marijuana emitting from the apartment."

Did you smell it at the threshold, which to me means the doorway, or did you smell it when you were coming down the hallway?

A. Both.

Q. And we know now that the suspect who was originally the subject of your pursuit entered into Apartment 78 shortly – 79 shortly prior to you entering the breezeway; is that correct?

A. Correct.

Q. Therefore, if a door had been recently opened, it's definite that door number 79 had just been opened?

A. No, it's not.

Q. So there was – how did you get inside [50] to open the door?

A. He would – he would have easily been to that doorway before we even got into the parking lot.

Q. You weren't even in hot pursuit then; he was already there and in, huh?

A. No, that's – that's not correct either.

Q. Well, tell me one way or the other, sir.

A. Could he have entered the apartment before we got there? Yes. Were we still in pursuit of him? Yes.

Q. Officer Gibbons was in the parking lot in an unmarked car; is that correct?

A. Correct.

Q. Officer Gibbons radioed over – you keep referring to radio information, and you referred to the crack cocaine –

A. Correct.

Q. – that you heard was the subject of this buy bust, correct?

A. Correct.

Q. But you're now telling us that in the report where you indicate that Officer Gibbons said that the suspect entered into the apartment on the back right that you didn't (inaudible) that?

[51] A. No, I didn't hear that when we entered the (inaudible).

Q. You weren't in the area anywhere within the proximity that – when the apartment on the back

right, 79, was opened that the marijuana smell could have been emitted? You would have had – it was that long a period of time before you arrived?

A. It's seconds – I mean, a period of seconds, but it is long enough that that door could have been closed, another door opened and closed before we entered into breezeway.

Q. Possible?

A. Yes.

Q. Possible.

MR. BOYD: I don't have any more questions.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: I don't think I have anything further, Judge.

THE COURT: Ms. Williams?

MS. WILLIAMS: No, I don't have any.

THE COURT: Mr. Eardley?

MR. EARDLEY: (Inaudible).

THE COURT: All right. May this officer step down?

[52] MS. WILLIAMS: Yes.

THE COURT: Officer, thank you, sir. I tell you what, let me – let me just ask you a couple of questions, if you don't mind.

THE WITNESS: Yes, sir.

THE COURT: And then I'll give all counsel another round here if I raise something.

EXAMINATION

BY THE COURT:

Q. When you were at the door of Apartment 78 and you said that you heard things being moved or heard movement inside the apartment, at first I thought you were talking about somebody moving furniture, but you're talking about people moving around?

A. Correct. Now, whether – Your Honor, whether they were moving furniture or things were being moved, we were just –

Q. I just – I just didn't know whether you were talking about the screeching of couches being moved on the floor or whether it was just – just foot traffic. That's all I was asking.

A. I couldn't discern exactly.

[53] Q. All right, sir. Now, you testified that by the time you were – as you were getting out of your vehicle and so on and you had not heard Detective Gibbons give the report that the suspect in the buy bust had gone into the back right apartment, which I think we've identified as Apartment 79, you didn't – you didn't realize that that's where he had identified that suspect going into.

When you and the other officers went down the breezeway toward both 78 and 79, did you know which of those two apartments that the suspect had gone into?

A. When I entered – when I entered the breezeway, no.

Q. So you just – you just knew the suspect from the buy bust had gone into that breezeway and went down that hallway?

A. Yes, sir.

Q. Timing-wise, you said that somebody had also gotten into Apartment 79 and put that subject who would have been the actual subject of the buy bust – had placed that subject under arrest.

Do you know whether the entry into 79 was before or after your-all's entry into 78?

[54] A. It was after.

THE COURT: Thank you, Officer.

Ms. Williams, do you any further questions based upon my questions?

MS. WILLIAMS: No, sir.

THE COURT: Mr. Eardley?

MR. EARDLEY: No, sir.

THE COURT: Mr. Boyd?

MR. BOYD: I do, Judge, just a couple of questions.

EXAMINATION

BY MR. BOYD.

Q. Officer, when you did enter into the left-hand apartment, Apartment 78, you have testified that Mr. Johnson was sitting on the couch smoking a marijuana cigarette; is that correct?

A. Correct.

Q. And Mr. King was sitting down?

A. When I – when I entered, I believe he was standing up.

Q. Did you see him in the act of moving any of the evidence that you say was in plain view?

A. No, when we entered, everyone – [55] everyone was where they were.

MR. BOYD: Okay. I don't have any more questions.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: I do, Your Honor.

EXAMINATION

BY MR. FRIEDMAN:

Q. So it's your testimony that as you were charging down the breezeway, you weren't sure which apartment the suspect had entered into?

A. When I entered the breezeway, no.

Q. Okay. There was no prior – no discussion of posting officers on the scene to watch the doors and getting a warrant?

A. No.

MR. FRIEDMAN: Okay. Thank you. That's all I have.

THE COURT: Ms. Williams?

MS. WILLIAMS: No, sir.

THE COURT: Mr. Eardley?

MR. EARDLEY: One last question, Your Honor.

[56] EXAMINATION

BY MR. EARDLEY:

Q. It's been your testimony, Officer Cobb, is that when you entered the breezeway, you did not know what door the suspect was in, correct?

A. Correct. Now, Officer Gibbons did radio that, but, no, I did not have knowledge of it when we entered the breezeway.

Q. Officer Gibbons radioed that. I mean, you heard it over the radio when he said he went into the back right –

A. No, I did not hear it over the radio, but it was radioed, yes.

Q. Okay. Where was – Officer Gibbons was sitting in the parking lot?

A. Correct.

Q. Did he stay in the car in the parking lot, or did he assist other than just sitting there?

A. No, because he was – he was unmarked at that time and also in plain clothes. He did not assist.

MR. EARDLEY: Okay. That's all. Thank you.

[57] EXAMINATION

BY MR. BOYD:

Q. When he – when he said that he saw (inaudible), did he come up to the breezeway, look down and see him go into the right, and then just let you guys come running by and then not say, "He's up in the right one"? How come he didn't tell you that "I just saw him go in the right"? He's at the scene.

A. Correct.

Q. He could have easily told you not by radio, by physical presence, verbally tell you, "He's right up there on the right," because your report says that he saw him?

A. Because he's in an undercover role at that point.

Q. But it was clear the police were there, right?

A. Correct.

Q. And he was present.

Where was he when you got out of your car and attempted to enter – or entered the breezeway?

A. I don't know.

Q. Were there any other detectives that [58] were with you, Maynard or – who was the other person you said that entered the apartment with you?

A. Sergeant – well, Sergeant Simmons was there.

Q. Had they already exited their vehicle prior to you exiting your vehicle?

A. It was about the same time.

Q. Did you inquire as to whether they heard the location of the suspect over the radio?

A. No.

Q. Did you-all have any discussion before you kicked the door down on the left?

A. Other than Detective Maynard looked at Sergeant Simmons, and we kind of – he told him what we were about to do, and Sergeant Simmons . . .

Q. How long were you in these people's – this apartment, in 78 on the left, before you realized that the guy in the red sweatshirt that you were chasing after wasn't in there?

A. Directly after the protective sweep, when the suspect wasn't located.

Q. And you testified that upon doing the protective sweep, you reentered the living room, and that's when you saw the marijuana and the cocaine?

A. I mean, it was in plain view. I guess [59] it could have been seen as you entered the apartment, but that's not – that's not what I was looking for. I mean, the suspect was the initial thing that we have to – be able to make sure that nothing has been destroyed as we enter, and then look for the suspect.

MR. BOYD: No further questions.

THE COURT: Last round.

EXAMINATION

BY MR. FRIEDMAN:

Q. Sir, did any other police officer orally or nonverbally communicate to you which apartment the suspect entered?

A. Yes.

Q. Which officer and how?

A. When we entered that breezeway, Detective Maynard – we went to that door in the back left-hand side.

Q. Okay. So Detective Maynard told you that the suspect went to the apartment on the left?

A. No.

Q. Did he indicate nonverbally?

A. Yes.

[60] Q. Okay. And that's what you clearly understood from him, "Go to the left apartment. That's where the suspect is"?

A. That's the apartment we went to. When we went in there, he did say he heard that door shut and then we – you know, obviously, myself, Detective Maynard, and Sergeant Simmons could smell the marijuana in the hallway, and it was – it was obviously strong when we got next to the door.

Q. Okay. Did Detective Maynard say anything about having heard Gibbons radio?

A. I don't remember that, no.

Q. So you're unable to testify about what Detective Maynard may or may not have known or communicated?

A. Correct.

MR. FRIEDMAN: Okay.

THE COURT: Anything further?

MR. FRIEDMAN: No, sir.

THE COURT: Anybody else? All right. Thank you, Officer. Any further proof on behalf of the Commonwealth?

MS. WILLIAMS: No, sir.

THE COURT: Any of the defendants intend [61] to present any proof?

MR. EARDLEY: No, sir.

MR. BOYD: No, Your Honor.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: No, sir.

THE COURT: Okay. What – what I would like to do is I would like to impose upon counsel to give me the benefit of your written thoughts on two issues since the Commonwealth is challenging the standing of Mr. King and Mr. Johnson.

I don't know how we want to do this order, whether we want to do somebody and a response and a reply or just simultaneous.

Anybody got any thoughts on . . .

MS. WILLIAMS: Judge, I would prefer if the three defense attorneys submit – and I will respond in one to all three.

MR. BOYD: Judge, I don't think that it's our job – if she's objecting to standing, she needs to cite case law as to why my client doesn't have standing. She's just presented proof that my client admitted to the police officer that he had a child that lived there, that his girlfriend was there.

If there's been anything proven by the evidence [62] that's been presented toward my client, it's that he did have a right to challenge the entry into the apartment, and I don't think it's fair to put the defendant in the position to say why it's okay when the prosecution hasn't even pointed out why it's not okay.

And I think typically when a motion to suppress is filed, there should be an answer objecting to my right to participate in the motion to suppress. Prior to that – you know, when that happens, then usually it's litigated whether or not we have standing prior to testimony being taken.

It puts me in a position where I have to try to figure out what it is she's saying – why my client can't be there. I don't think I should bear the burden here to say why it's – he does have standing. I think

they should present case law as to why he doesn't first. Then I can respond.

MS. WILLIAMS: Actually, Judge, the case law states that it's on the defendant to prove that the has standing. It's not on the Commonwealth to prove whether or not a person has standing. It's on the defendant to prove that he has standing to challenge the search.

THE COURT: Well, as I – you know, I [63] was kind of – once you raised it, I was kind of expecting somebody to say whose apartment it was and why the other folks were there or something. I didn't hear anything on – on that, did I?

You know, what am I supposed to do with it under these circumstances? I don't know other than what somebody told me verbally, which is not evidence – I don't know whose apartment it was or who is on the lease, or, you know, anything. You know, do I?

MR. BOYD: I think that they said it was her – Ms. Washington's apartment from the stand. I think that's –

THE COURT: Did Officer Cobb say that? Did I miss that? I don't – I don't remember him saying that, just that he went – that he busted the door down. I don't remember him saying – I mean, you know, I'm just sort of talking out loud now, guys. I don't know.

MR. BOYD: Judge, I think that it becomes a moot point, if Ms. Washington has standing and the evidence is suppressed upon her behalf, then that fruit of the poison tree flows to my client and to Mr. Friedman's client.

I think that the real issue here, Judge, is [64] that the Commonwealth bears a heavy burden in entering a house without a warrant, and it's their burden to prove that. And if we get into the standing issue and somehow you rule that we didn't have standing, my client would still be entitled to the benefit of exclusionary rule with regard to Ms. Washington, so I think it's an issue that isn't necessary –

THE COURT: Okay.

MR. BOYD: – to be litigated.

THE COURT: Here we're going to go. Mr. Eardley, you had also raised in your written motion the Fifth Amendment – the testimony. Do you – do you intend to argue that?

MR. EARDLEY: I – I –

THE COURT: You were the only one that raised that, and I just – I wasn't going to cut you off, but I just didn't know whether you still intended to pursue that or not.

MS. WILLIAMS: And Mr. Eardley and I – I mean, he put that in his motion. I (inaudible).

MR. EARDLEY: (Inaudible), Your Honor, but I think – I don't think we're prepared on – I think

it's just inadvertent oversight to (inaudible), Your Honor, but your ruling on this [65] might make that issue moot. So I suppose (inaudible).

THE COURT: Okay. The way I – the order I would like to do it – I want to put the ball in the defendants' court to start with, and you-all can file three separate – if you want to, or you can combine it. I'm going to leave that in the discretion of the defense lawyers.

How long do you – do you want to have to file something – touch base with each other on how you want to do it. How long do you want to have?

MR. BOYD: Judge, you wanted to address the substantive issue and the –

THE COURT: Well, what I would – the two issues I want – I want you to address – the two of you – or, see, under the proof, I'm kind of – I'm kind of at a loss a little bit.

You can address the standing – the two issues I'm – I'm looking at right now is standing and whether the search and seizure was proper. So you can – you can address the standing, and then secondly, the search and seizure, whether this entry into the apartment and the seizure of the various narcotics that were described – whether or not that was proper or not, whether that meets the [66] constitutional muster or not.

That's the two issues I'm – I'm kind of looking at, unless somebody tells me that they want me to look at something else right now.

MR. BOYD: Maybe I'm just confused, Judge, but I thought, in this situation, when we've got a warrantless entry that the Commonwealth bears the burden of proving, one, probable cause, and exigent circumstances.

They haven't submitted – I don't – how do I respond to what they're saying exigent circumstances are if they haven't delineated whether it was hot pursuit, destruction of evidence, and the people were aware of it?

It seems to me that if we don't have – if they have the burden of proving that at what – (inaudible) unreasonable when you – warrantless entry into a house. That's their burden to prove that it's reasonable.

THE COURT: And have I got the cart before the horse, Ms. Williams?

MS. WILLIAMS: No, Judge, I don't think that you do. Officer Cobb testified here today that he entered the apartment based on the smell of marijuana that was coming from the apartment and the [67] fact that he believed people were destroying evidence and he heard the movement inside.

MR. EARDLEY: Your Honor, this – you know, I came for the hearing today, I wasn't quite sure what their justification of the warrantless entry

was going to be, and you know, three possibilities: One, hot pursuit; two, exigent circumstances, destruction of evidence; and three, plain view of (inaudible). I'm not sure, you know, what theory they are trying to testify under (inaudible) Mr. Boyd says it makes it difficult, I think, for us to go first when we haven't heard them justify it yet.

MS. WILLIAMS: Your Honor, that is all written in the officer's report, why he entered that apartment. So I think to say that they came in today without any idea under what theory the Commonwealth was going to discuss here today is not true because it's all written in the report, and they actually referred to that report here today in this hearing on page number seven, which has been provided to each of the defense attorneys in discovery.

MR. BOYD: Judge, if I could respond to that.

[68] If we're going to refer to the report, then the report indicates hot pursuit because Officer Gibbons indicates that he saw visually the suspect go in, and I don't want to start citing cases here, but there's a supreme court case from 1994 that basically makes it clear that that hot pursuit has to be continuous.

He's admitted it wasn't continuous. He never had visual eye contact with the subject. So can we just not address hot pursuit because they can't prove it by hot pursuit, or do we have to assume that maybe – you know, Bob, what are your thoughts on this? I mean, you've been around long enough.

MR. FRIEDMAN: In more senses than one since I seem to have the most gray hair among us.

I would like to know and have it stated exactly what basis the Commonwealth is going on because it was my experience of Officer Cobb's testimony that there were some significant shifts.

Okay. Are we talking about because of destruction of evidence, by the way, which was not borne out. The one thing he was able to cite was quite a stretch, I think, crack cocaine behind a picture frame.

Is it just that these people didn't want to let [69] them in when they announced, "Police"?

Is it that he was following his nose and trusts his nose perhaps more than anyone has a right to under the circumstances?

Or is it that the police were completely confused collectively, even if Officer Gibbons was not individually, that as to where the suspect went, and so they just decided they were going to enter both apartments?

I mean, I have problems with each of them, obviously, but I would like to know if the Commonwealth is asserting one, two, all of them, or some fourth thing, because, yes, the police report says something, but we heard testimony today that creates exactly this kind of question in my mind, and I would not be surprised if it created exactly the same kind of question in the minds of my clients here.

THE COURT: Okay. I'll – wait a minute. Let me kind of reverse myself in the extreme.

Ms. Williams raises a standing issue, and since you've raised it, it seems like maybe the ball is in her court on that one.

MS. WILLIAMS: Well, actually, Judge, [70] I – I will respond to standing, but the case law says that it's in the defendants' court, but I will respond to standing.

THE COURT: Okay. On the search and seizure, I guess that you're aware of the well-established case law that says that warrantless search is per se unreasonable unless it can be justified by one or more of the exceptions, and so let me ask the Commonwealth to file first.

How long do you want, Ms. Williams? On the two issues, the standing and the search and seizure, how long do you want?

MS. WILLIAMS: Judge, probably two weeks. I have all the case law that I'm going to need.

THE COURT: Okay.

MS. WILLIAMS: I don't need to research.

THE COURT: Okay. That would put us at April the 7th, round numbers.

Defendants either collectively or individually, however you-all decide you want to do it, a few weeks after that. Do you want to do April 21?

MR. EARDLEY: That's fine.

MR. FRIEDMAN: Yes, Your Honor.

THE COURT: Does the Commonwealth want [71] to have a reply?

MS. WILLIAMS: Yes.

THE COURT: Can you turn that around in a week, or do you want two?

MS. WILLIAMS: In a week.

THE COURT: All right. The Commonwealth reply April 28th. Let's set this down for status.

Anybody going to be gone either May 5th or May 12th? Either of those better or worse for anybody?

MR. EARDLEY: Either is fine.

MR. BOYD: The 5th is fine.

MS. WILLIAMS: Either one, Judge.

THE COURT: The 5th okay, Mr. Friedman?

MR. FRIEDMAN: Yes, Your Honor.

THE COURT: All right. If you can, when you file your originals down with the clerk, would you try to remember to drop me a copy off in my chambers or just put – have them put in my box so I'll be aware that they are filed and be trying to read ahead and so on?

So that's the Commonwealth April 7, the defendants April 21, Commonwealth reply April 28th, and I'm going to put this on for status on May the 5th, and hopefully by that time, I will have had a chance to look at everything and be – either have [72] written something or be prepared to make a ruling on the – on the 5th.

Mr. Johnson and Ms. Washington, you are out on bond. I'm going to allow you to remain out on the same bond. No violations of law in any respects. Stay in touch with your respective attorneys, and you're scheduled to be back in court on May 5th at 1:00 p.m.

MR. BOYD: Your Honor, I wanted to address one issue with regard to the disparity of the bond in this matter.

At the presetting of this case, when we attempted to last time, there was mention that my client was facing a persistent felony offender charge.

I think it's noteworthy for the Court to realize that there's one defendant that's out on a third party, and there's another defendant that's out on a thousand dollars.

Of those people, one admitted to possessing the cocaine involved. I mean, that's not an issue, and I'm not trying to, you know, square their deal or anything, but I think that – my client has a $75,000 bond, but he's a PFO second. Mr. Johnson being out at PFO one, based on the same charges, I [73] just don't – and not only the fact that my client is entitled

to hire private counsel in this case. You know, I think that he deserved some bond consideration here, and especially with the evidence that was presented, Judge. I –

MS. WILLIAMS: Judge, we didn't oppose any bond reduction. Mr. King's prior was for bail jumping in the first degree, and his other prior is for facilitation to commit murder. So based on his past record, we would ask that he – his bond be – remain as it is.

THE COURT: Well, I knew this was coming up because I had promised Mr. Boyd in our last status that I would take another look at – at the bond when –

MR. BOYD: She says facilitation of murder? I've got count five being bail jumping and trafficking. I'm not sure where this facilitation of murder is coming from, but it sure wasn't charged in the PFO.

MS. WILLIAMS: No, but he has a prior facilitation to commit murder, and he received a four-year sentence in – out of Fayette Circuit Court in May of 1998.

THE COURT: I guess what I'm leaning on [74] my accounts is this: I'm very concerned about Mr. King's charges. The bail jumping first primarily. You know, they are serious charges, the PFO second he's got. So I'm – I'm – I'm weighing that.

I'm also looking at Mr. Johnson, who is a PFO first, and I'm looking here in a prior court has set this at $10,000/10 percent on PFO first.

I'm kind of weighing those. I'm not sure how – how those things weigh out.

MR. BOYD: And, Judge, my client was asking for 10 percent of the $75,000, and, you know, I don't think that that's – that's a lot of money posted, and that's – and he is a PFO two.

I mean, I understand that it's a concern to the Commonwealth that he's got prior charges, but they are eight years old, though. And we've got a defendant that's got even more serious – PFO one, and he's got appointed counsel and is out on $1,000 bond, and my client has been in for about five weeks – almost six months now, and I believe that we have a legitimate issue here that should result in suppression.

My client is going to be further prejudiced by the fact that he continues to say [sic] in jail while we [75] do the briefing schedule.

You know, I think that this Court should also note the fact that we have set this hearing several months ago, at least two months in advance, and I think that the fact that we're addressing a standing issue that should have been brought before the Court and could have been litigated prior to the morning of the hearing – I do believe prejudices my client having to remain in custody while I address these issues.

MS. WILLIAMS: Whether or not his client stays in custody or – has nothing to do with the issues that were before us today, based on his past record.

And just for the record, the Commonwealth objected to Mr. Johnson's bond, but the judge reduced that anyway.

THE COURT: Mr. Friedman, if you think it would be fair, I ought to raise Mr. Johnson's up to what Mr. King's is?

MR. FRIEDMAN: Actually, I think it would be illegal, Your Honor. There's been no demonstration of change of circumstances by clear and convincing evidence.

THE COURT: I take that as a no?

[76] MR. FRIEDMAN: Oh, yes.(Inaudible) Your Honor. (Inaudible).

THE COURT: Mr. King is released on some sort of bond, but employment, where is he staying, all that stuff?

MR. BOYD: He's staying with his brother – his mother.

THE COURT: I'm sorry?

MR. BOYD: I think he's staying with either his mother or his brother. His brother (inaudible) is in the courtroom, but he would either be with him or his mother.

He did just indicate to me that his brother said that they couldn't make $75,000, but they could make $50,000 at 10 percent, but (inaudible) just try to answer the third question of $75,000, but as far as employment, I'm not sure. He doesn't have a lot of possibilities because he's been in for five months, and we didn't know if we – you know, I can start helping him look for job opportunities and make it a condition that he gets full-time employment, and, you know, submit to testing, whatever the conditions. I just think he deserves his freedom prior to trial here under these facts.

MS. WILLIAMS: And, again, Your Honor, [77] the Commonwealth would oppose due to his past record. Facilitation of murder was not charged as PFO first because he was a juvenile when he committed that offense, along with wanton endangerment first.

MR. BOYD: Well, Judge, I would object to these being mentioned since it was a juvenile proceeding, and if it's a juvenile proceeding, I don't think that it's –

MS. WILLIAMS: He was charged as an adult, Your Honor, but he was under the age of 18 when he committed it. Therefore, it cannot be used in the PFO statute to enhance. However, it can absolutely be used in the sentencing and determining whether or not he can be released on bail.

THE COURT: What is the brother's name?

MR. BOYD: David Campbell.

THE COURT: I'm sorry, sir?

MR. BOYD: David Campbell.

MR. CAMPBELL: David Campbell.

THE COURT: Where do you live, sir?

MR. CAMPBELL: 3607 Laredo Drive, 40517.

THE COURT: 17?

MR. CAMPBELL: Yes, sir.

THE COURT: Is that an apartment, a [78] house, or what?

MR. CAMPBELL: It's a (inaudible).

There's also four kids in the house, so there isn't going to be no trouble while our kids are home.

THE COURT: And who-all lives in there?

MR. CAMPBELL: Me, my girlfriend, my – and our four children.

THE COURT: I'm going to reduce Mr. King's bond from (inaudible) $75,000. I'm going to let him post 10 percent on these terms and conditions: that he stay with his brother, David Campbell, 3607 Laredo Drive, Lexington, 40517; that he maintains a permanent address there.

Listen up, Mr. King. If you get out, sir, you're supposed to stay with your brother. That doesn't mean having a toothbrush there and staying everywhere else. That means you stay with your brother, sir.

And random drug testing per pretrial, no violations of law in any respect.

Mr. King, I'm taking the chance. It makes me very, very nervous.

And Mr. Johnson, just for your benefit, if I had been the one setting your bond, I wouldn't have set it at $10,000 at 10 percent because I do think [79] there ought to be some equalization, within spitting distance, anyway.

It makes me very, very nervous. If you do get out, sir, if you violate the law in any respect and you turn in a dirty, I'm going to revoke it immediately, and, you know, there will be some consequences to it. So I ask you to honor the good spirit and the intent of the motion of your attorney and honor the confidence that the Court has. Don't be going out and messing up. It will only result in other consequences and so on.

And Brother David, if may be so informal to address you as that, I'm going to look to you, sir –

MR. CAMPBELL: Yes, sir.

THE COURT: – because I'm impressed that you would come and be here for the hearing, that you have a stable home.

MR. CAMPBELL: Yes, sir.

THE COURT: And I'm frankly looking to you to observe a good influence, and for Pete's sake, don't be letting any foolishness –

MR. CAMPBELL: Yes, sir.

THE COURT: – go on there in your home with your kids and all of that type of thing.

[80] And if you – my daddy used to have a term, "jerk a knot in his tail" when I'd act up. You have my permission to jerk a knot in Mr. King's tail if he acts up.

MR. CAMPBELL: Yes, sir.

THE COURT: You know, that's not a legal term, but I don't think there's any misunderstanding as to – as to the meaning is between me and you.

MR. CAMPBELL: Yes, sir, I know.

THE COURT: All right. All right. We've got the briefing schedule, and I look forward to getting that – that from all of the attorneys with the next status.

If you get out, Mr. King, stay in touch with Mr. Boyd. No violations of law in any respect, random drug testing through the pretrial. Mr. Boyd – everybody stand – stand still here.

MR. CAMPBELL: I'm sorry.

THE COURT: All right. Mr. Boyd, if I can impose upon you to call Ms. Pam O'Bryan at pretrial and get the information on random drug testing, and then we'll be back.

All right. We're in recess.

MR. BOYD: Thank you, Your Honor.

(VIDEOTAPED HEARING CONCLUDED.)

[81] STATE OF KENTUCKY)
)
COUNTY OF JEFFERSON)

I, LISA MIGLIORE BLACK, A NOTARY PUBLIC, WITHIN AND FOR THE STATE AT LARGE, DO HEREBY CERTIFY THAT THE FOREGOING WAS TAKEN BEFORE ME STENOGRAPHICALLY VIA VIDEOTAPE AND AFTERWARDS TRANSCRIBED UNDER MY DIRECTION; THAT THE FOREGOING IS A FULL, TRUE, AND CORRECT TRANSCRIPT TO THE BEST OF MY ABILITIES AS MUCH AS THE QUALITY OF THE RECORDING WILL ALLOW.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR OF KIN TO ANY OF THE PARTIES TO THIS ACTION, AND AM IN NO WAY INTERESTED IN THE OUTCOME OF SAID ACTION.

WITNESS MY SIGNATURE THIS 26TH DAY OF OCTOBER, 2010. MY COMMISSION EXPIRES NOVEMBER 10, 2013.

/s/ Lisa Migliore Black
NOTARY PUBLIC
STATE AT LARGE, KENTUCKY

PETITIONER'S BRIEF

No. 09-1272

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In The
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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QUESTION PRESENTED

Police officers entered an apartment building in hot pursuit of a person who sold crack cocaine to an undercover informant. They heard a door slam, but were not certain which of two apartments the trafficker fled into. A strong odor of marijuana emanated from one of the doors, which prompted the officers to believe the trafficker had fled into that apartment. The officers knocked on the door. They then heard noises which indicated that physical evidence was being destroyed. The officers entered the apartment and found large quantities of drugs. The Kentucky Supreme Court held that this evidence should have been suppressed, ruling that the exigent circumstances exception to the warrant requirement did not apply because the officers created the exigency by knocking on the door. The question presented is:

> When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

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In the Supreme Court of the United States

No. 09-1272

COMMONWEALTH OF KENTUCKY, *Petitioner*

v.

HOLLIS DESHAUN KING, *Respondent*

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

OPINIONS BELOW

The Supreme Court of Kentucky's opinion (Pet. App. 34a-50a) is reported as *King v. Commonwealth*, 302 S.W.3d 649 (Ky. 2010). The Court of Appeals' decision (Pet. App. 12a-33a) is unreported, however it can be found at *King v. Commonwealth*, 2008 WL 697629 (Ky. App. 2008). The Fayette County Circuit Court Findings of Fact and Conclusions of Law from the suppression hearing can be found in Petitioner's Appendix. Pet. App. 1a-11a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky entered the judgment from which relief is sought on January 21, 2010. Pet. App. 34a-50a. The petition for a writ of certiorari was filed on April 19, 2010 and certiorari was granted on September 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts

On October 13, 2005, the Lexington Police conducted an undercover "buy-bust" operation, in which undercover informants purchased narcotics from felony drug traffickers. Joint Appendix (J.A.) 15-18. During this operation one such felon, after selling the undercover informant crack cocaine, began moving at a fast pace, running back to his apartment. J.A. 19-20.

An undercover officer radioed to waiting patrol cars that the felon was fleeing from the scene at a fast pace and that they should quickly move in and apprehend him. Uniformed officers, waiting nearby, immediately exited their cruisers and quickly proceeded to the apartment building breeze-way that the fleeing felon had entered. J.A. 17-21.

Upon entering the breeze-way, the officers heard a door slam at the far end of the hall. There were only two doors into which the felon could have fled. J.A. 21-23, 58-59, 65-66. The officers encountered the scent of burning marijuana, which became stronger as they approached the apartment doorway on the left of the hallway. Due to the strength of the odor at the door's threshold, the officers reasoned that the left rear door was the door that had recently been slammed. The officers reasoned that the opening of the left rear door which allowed the fleeing felon entry, also allowed the scent of burning marijuana to escape the apartment. The officers therefore believed that the fleeing felon had entered the apartment door on the left. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. However, out of an abundance of caution, not knowing specifically which door the felon entered, the police officers knocked loudly on the left door and announced themselves. J.A. 21-24.

After no response, the officers heard things inside the apartment being moved around. Based upon their training and experience, the officers recognized the sounds coming from the apartment to be consistent with the sounds of destruction of physical evidence. J.A. 23-25, 40-43. Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police officers entered the apartment. J.A. 24-25, 45-47.

In an attempt to locate the fleeing suspect, the officers immediately conducted a protective sweep of the apartment. However, the suspect could not be located. J.A. 24-28, 63-65. After completing the protective sweep, the officers noticed in plain view several large quantities of both marijuana and cocaine. At this point the officers placed the occupants of the apartment under arrest. Respondent was one of the occupants in the apartment who was arrested. J.A. 24-26, 60, 64.

B. Procedural History

1. Fayette County Circuit Court

A Fayette County Grand Jury indicted Respondent on November 21, 2005, and charged him with first-degree trafficking in a controlled substance, trafficking in marijuana, and being a second-degree persistent felony offender. Respondent moved to suppress the evidence discovered after the warrantless entry. After a suppression hearing, the Fayette Circuit Court denied respondent's motion to suppress.

The circuit court held that the smell of burning marijuana coming from the apartment door provided the probable cause for the officers to continue their investigation. The court went on to state that the investigation was properly conducted by initially knocking on the door, announcing police presence, and awaiting a response or consensual entry. The circuit court held that no response from the apartment, coupled with noises indicative of destruction of

evidence, particularly narcotics due to the smell, constituted exigent circumstances justifying warrantless entry into the apartment. Pet. App. 9a-10a.

Respondent entered a conditional guilty plea, reserving his right to appeal the circuit court's denial of his motion to suppress. Respondent pled guilty to trafficking in a controlled substance; possession of marijuana; and persistent felony offender in the second degree. Respondent received an eleven-year sentence.

2. Kentucky Court of Appeals

Respondent appealed the circuit court's denial of his suppression motion to the Kentucky Court of Appeals. On March 14, 2008, the Kentucky Court of Appeals affirmed the circuit court's denial of his motion to suppress. Pet. App. 12a.

The Kentucky Court of Appeals held that the exigent circumstances exception to the warrant requirement was not applicable, because the police had created the exigency by knocking on the apartment door. Nonetheless, the Court of Appeals held that the entry was valid under the "good faith" exception since the officers did not take any deliberate action to evade the warrant requirement. Pet. App. 21a-24a. The Court of Appeals did not specifically address the hot pursuit exception, but noted that it could not "be concluded as a matter of law that it was unreasonable for the police to have believed that the suspect knew of their presence and that they had to take immediate

action to prevent the destruction of evidence." Pet. App. 21a. The Court of Appeals stated,

> Therefore, because the police were pursuing a suspected felony crack cocaine dealer following a "buy-bust" operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime, we conclude that the warrantless entry into King's apartment was valid.

Pet. App. 24a.

3. Kentucky Supreme Court

Respondent sought discretionary review of the Kentucky Court of Appeals' decision to the Kentucky Supreme Court, which was granted. On January 21, 2010, the Kentucky Supreme Court, issued a published decision reversing and remanding the case to the trial court, overruling the circuit court's denial of the motion to suppress evidence found after warrantless entry. Pet. App. 34a.

The Kentucky Supreme Court ruled that neither the hot pursuit nor exigent circumstances exception was applicable.

As to hot pursuit, the Kentucky Supreme Court stated that the exception did not apply because the suspect was unaware that the police were pursuing him. Pet. App. 40a-41a. The court reasoned that "[a]n important element of the hot pursuit exception is the

suspect's knowledge that he is, in fact, being pursued." Pet. App. 40a (citation omitted). Based upon this reasoning the court held that since there was no direct evidence that the suspected drug trafficker knew that the police were in pursuit of him, the police were not in hot pursuit. Pet. App. 41a.

As to exigent circumstances, the Kentucky Supreme Court held that by knocking on the door and announcing their presence the police officers created the resulting exigency of destruction of evidence, and, therefore, the police could not rely on this exigency to effect warrantless entry. Pet. App. 47a.

In reaching this conclusion, the Kentucky Supreme Court acknowledged that, in some sense, exigent circumstances justifying warrantless entry are always created by the police. Pet. App. 44a. The court concluded, nonetheless, that in certain circumstances police may not create the exigent circumstances that would otherwise justify a warrantless entry. Pet. App. 43a.

The Kentucky Supreme Court recognized that the federal circuits and states have adopted differing tests for determining when police impermissibly create the exigent circumstances relied upon for warrantless entry. After discussing the differences in the tests for the Second, Third, Fifth, Sixth, and Eighth Circuits, and the Arkansas Supreme Court, the Kentucky Supreme Court crafted its own test. Pet. App. 44a-46a.

The court grafted one part of the Fifth Circuit's test for police-created exigencies with one part from the Arkansas Supreme Court's test, to create a hybrid two-part test for Kentucky.

> First, courts must determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." [*United States v.*] *Gould*, 364 F.3d 578, 590 [(5th Cir. 2004)]. If so, then police cannot rely on the resulting exigency. Second, where police have not acted in bad faith, courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry." *Mann* [*v. State*, 161 S.W.3d 826] at 834 [(Ark. 2004).]. If so, then the exigent circumstances cannot justify the warrantless entry.

Pet. App. 45a-46a.

The Kentucky Supreme Court applied this new test to the facts of Respondent's case and determined that the officers did not act deliberately with the bad faith intent to avoid the warrant requirement. However, under the second part of its new test the court determined that the resulting exigent circumstances, the destruction of physical evidence, was a reasonably foreseeable result of knocking on a door and announcing police presence after having smelled burning

marijuana emanating from the apartment door. Pet. App. 46a-47a.[1]

SUMMARY OF ARGUMENT

This Court has set forth well-established exceptions to the warrant requirement that are necessary for police officers to effectively carry out their duties.[2] One long established exception is when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). A paradigmatic example of exigent circumstances is when police reasonably believe that

[1] The Kentucky Supreme Court's decision in Respondent's case also overruled the Kentucky Court of Appeals decision in his co-defendant's case. See *Washington v. Commonwealth*, 231 S.W.3d 762 (Ky. App. 2007).

[2] See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403-407 (2006) (emergency aid); *Welsh v. Wisconsin*, 466 U.S. 740, 749-750 (1984) (discussing exceptions to the warrant requirement under exigent circumstances); *Payton v. New York*, 445 U.S. 573, 583-590 (1980) (same); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (emergency aid); *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978) (discussing exceptions to the warrant requirement under exigent circumstances); *United States v. Santana*, 427 U.S. 38, 42, 43 (1976) (hot pursuit); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971) (discussing exceptions to the warrant requirement under exigent circumstances); *Katz v. United States*, 389 U.S. 347, 357 (1967) (same); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966) (imminent destruction of physical evidence); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion) (same).

evidence is being destroyed. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966); *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972). At issue in this case is whether the Fourth Amendment forbids police from acting upon that exigency – the destruction of physical evidence – if the defendant began destroying the evidence in response to an officer's lawful knock and announce. It does not.

Neither the Fourth Amendment nor this Court's analysis of its protections, constrains law enforcement in such a manner as to prevent their action in the face of illegal activity. This holds true regardless of the officers' subjective intent in knocking and announcing and regardless of whether the officers should have foreseen the possibility of the defendant's illegal actions. See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403-404 (2006) (subjective intent is irrelevant); *Horton v. California*, 496 U.S. 128, 138 (1990) (foreseeability does not invalidate seizure).

The Kentucky Supreme Court's ruling in this case improperly relies on these two specific conditions, subjective intent and foreseeability. In doing so, its ruling unduly impinges upon proper police investigation and rewards unlawful behavior. This Court should therefore reverse the lower court's decision and instead hold (as the Second Circuit has) that so long as law enforcement officers act lawfully, they do not impermissibly "create" exigent circumstances. Adoption of this easily discernable rule simplifies "on the spot" determinations that police officers must make and preserves the proven effectiveness of the

"knock and talk" procedure, while discouraging police abuse. See *New York v. Belton*, 453 U.S. 454, 459-460 (1981) (noting clear standards provide individuals with knowledge of constitutional protections and police with scope of authority).

ARGUMENT

The Officers Did Not Impermissibly "Create" the Exigent Circumstances That Justified Their Entry Into Respondent's Apartment

A. Law Enforcement Officers Act Reasonably When They Knock and Announce, and Then Enter a Home Based on Exigent Circumstances

The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).[3] This Court has consistently applied this objective standard to analyze Fourth Amendment cases.[4]

---

[3] "The test of reasonableness under the Fourth Amendment is an objective one." *Los Angeles County, California v. Rettele*, 550 U.S. 609, 614 (2007) citing *Graham v. Connor*, 490 U.S. 386, 397 (1989) (addressing the reasonableness of a seizure of the person). See also *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness . . . is measured in objective terms by examining the totality of the circumstances.").

[4] See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996) (objective standard dealing with removal of individuals from vehicles); *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) (objective standard dealing with whether consent was valid); *Illinois v. Rodriguez*, 497 U.S. 177, 188-189 (1990) (objective standard

(Continued on following page)

The validity of law enforcement officers' actions therefore depends on "the reasonableness in all the circumstances" of the law enforcement practice at issue. *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (citation omitted). The first relevant action the officers in this case took was knocking on the door of Respondent's apartment and announcing their presence. The second relevant action was entering the apartment after reasonably concluding that they heard evidence being destroyed. Under well-established Fourth Amendment jurisprudence, both actions were plainly reasonable and therefore permissible.

1. "Knock and Talk" is an Objectively Reasonable Investigatory Procedure That Initiates a Consensual Encounter

Police officers engage in myriad encounters with the general public, only a fraction of which constitute

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dealing with whether consent was valid); *United States v. Place*, 462 U.S. 696, 702 (1983) (objective standard dealing with temporary detention of personal items based on less than probable cause); *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979) (objective standard dealing with temporary detention of a motor vehicle based on less than probable cause); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (objective standard dealing with temporary detentions of individuals based on less than probable cause). Likewise, this Court uses an objective test even in determining an officer's good faith. *Maryland v. Garrison*, 480 U.S. 79 (1987) (upholding the search of an apartment not included in the search warrant because the "objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises.").

seizures within the meaning of the Fourth Amendment. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" has a seizure occurred. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968). When the police have not seized an individual – for example, when police initiate a consensual conversation with a person – "there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). In addition, this Court has held that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals," and *not* to eliminate all contact between police and the citizenry. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

Subjecting consensual encounters between the police and the public to Fourth Amendment strictures, "while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." *Mendenhall* at 554. Indeed, "police questioning" is an important "tool in the effective enforcement of the criminal laws." *Ibid.*

One of the most common police investigatory procedures is a "knock and talk," in which officers lawfully approach a person's home and engage them in conversation. As then-Justice Rehnquist pointed

out in his dissent to this Court's decision in *Dunaway v. New York*, 442 U.S. 200, 222 (1979),

> [t]here is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him.

See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973) ("Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, *or in a person's home or office*, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning.") (emphasis added); *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (noting Fourth Amendment protection against unreasonable searches and seizures does not prohibit voluntary cooperation).

This police investigatory procedure is employed every time an officer approaches a home to speak with the occupants concerning a crime that has occurred. Federal courts have recognized the "knock and talk" strategy as a reasonable investigative tool when officers seek to gain an occupant's consent to

search or when officers reasonably suspect criminal activity.[5] See *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005) (recognizing legitimate investigative procedure of "knock and talk" consensual encounters).[6]

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[5] Petitioner contends that reasonable suspicion need not be present for an officer to engage in a consensual encounter with a citizen. Court's have addressed that reasonable suspicion is not necessary for a "knock and talk." See *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) (recognizing that reasonable suspicion is not mandatory to conduct a "knock and talk" investigation); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (recognizing suspicion not required to justify "knock and talk"); *United States v. De Jesus Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) (affirming "knock and talk" as reasonable tactic even absent reasonable suspicion). However, regardless of whether the proper standard for conducting a "knock and talk" investigation is no suspicion, reasonable suspicion, or probable cause, it does not matter for the purposes of this case. It is undisputed that the officers here had probable cause of a crime occurring within the apartment. Pet. App. 39a.

[6] See also *Hardesty v. Hamburg Twp.*, 461 F.3d 646, 653-654 (6th Cir. 2006) (recognizing validity of soliciting consent through "knock and talk"); *United States v. Tobin*, 923 F.2d 1506, 1511 (11th Cir. 1991) *cert. denied*, 502 U.S. 907 (1991) ("Reasonable suspicion cannot justify the warrantless search of a house, but it can justify the agents' approaching the house to question the occupants."); *United States v. Hardeman*, 36 F.Supp.2d 770, 777 (E.D.Mich.1999) (discussing the "knock and talk" procedure to obtain a suspect's consent to search).

2. Entry Based On Exigent Circumstances That Arose After a Lawful "Knock and Talk" is Objectively Reasonable

Lawful police action sometimes results in the creation of exigent circumstances – particularly when the police act based on a reasonable suspicion of wrongdoing. Yet under the decision below and the rules adopted by multiple circuits, the police are barred from acting in response to those exigencies. In those jurisdictions, an officer who hears evidence being destroyed or an individual being attacked – merely because the officer knocked on the door – violates the Fourth Amendment by entering the residence in response to that exigency. It is critical that this Court remove that senseless bar on the ability of the law enforcement community to protect the public.

As noted, police officers may engage in warrantless searches and seizures if there is a "specially pressing or urgent law enforcement need, *i.e.*, 'exigent circumstances.'" *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). For example, "law enforcement officers may make a warrantless entry onto private property . . . to prevent the imminent destruction of evidence." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Ker v. California*, 374 U.S. 23, 40 (1963)). See also *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

Accordingly, the officers in this case engaged in two actions that, viewed independently, raise no Fourth Amendment concerns. Here, officers acted reasonably in knocking on the Respondent's door. See *United States v. Mendenhall*, 446 U.S. 544 (1980). The officers then acted reasonably when they entered Respondent's home based on the exigent circumstances exception of the destruction of physical evidence.[7] See *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972); *Schmerber v. California*, 384 U.S. 757, 770-771 (1966).

These two actions also raise no Fourth Amendment concern when viewed as part of one continuous course of conduct. Two Fourth Amendment "rights" do not make a "wrong."

The Kentucky Supreme Court nonetheless concluded that the officers violated the Fourth Amendment because they "created" the exigency by knocking and announcing their presence. In particular, the court held that it is unreasonable for officers to knock and announce, and then enter an apartment after they hear evidence being destroyed, if (1) it was foreseeable that knocking and announcing would prompt the exigency (here, the destruction of evidence), or (2) the officers acted in bad faith or otherwise intended that result. The Kentucky Supreme Court thus concluded that two "rights" make a

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[7] The existence of exigent circumstances have been assumed for purposes of this case. Pet. App. 43a.

"wrong." This math is unsupported by the Fourth Amendment. Obviously, two reasonable actions on the officers' part, should not an unreasonable action make. As discussed below, the Kentucky Supreme Court's holding finds no support in this Court's decisions, undermines accepted and laudable police practices, and rewards illegal conduct.

B. It is Reasonable for an Officer to Engage in a Consensual Encounter with a Person Regardless of Whether it is Foreseeable That the Person Will Respond by Engaging in an Unlawful Act

This Court has never held that it is unreasonable for a police officer to engage a member of the general public in a consensual encounter on the ground that the person may respond by committing an unlawful act that necessitates a seizure. To the contrary, in *Horton v. California*, 496 U.S. 128, 138 (1990), this Court held that "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search" should not invalidate its seizure if the search is confined to a valid exception to the warrant requirement. In other words, simply because seizure is foreseeable, it should not be invalidated. The same principle is applicable here. Simply because police officers could arguably foresee an illegal reaction to their lawful "knock and talk" does not render their actions a Fourth Amendment violation. To hold otherwise would reward illegal behavior and stand contrary to this Court's prior precedents.

A contrary rule would have several deleterious consequences. First, it would be utterly unworkable for officers in the field. Officers engage in countless consensual interactions with suspects. A foreseeability rule would require officers, *every time* they approach a suspect on the street or knock on a suspect's door, to assess whether the possibility of an unlawful response bars that otherwise lawful consensual encounter. But how is an officer to know? Different suspects react in different ways to police encounters; and even when a suspect might be expected to hide or destroy contraband, how is the officer to know that the suspect will do so loudly or openly enough that it will create an exigent circumstance justifying a warrantless seizure or entry?

A foreseeability test would mean that officers are *not* permitted to approach suspects who, based on their observed attributes and past history, seem more likely to respond illegally (by, for example, drawing a weapon or destroying evidence), but *are* permitted to approach suspects who appear less likely to respond in that manner. More dangerous suspects would therefore be more shielded from police encounters. Such a rule makes no sense, and its consequence is obvious: "the security of all would be diminished." *Schneckloth*, 412 U.S. at 225.

Even worse, this test rewards the illegal actions of a suspect in response to lawful police action. It is the actions of the suspect that give rise to the exigent circumstances, not the lawful actions of the officers who are attempting to engage him in conversation.

For example, a home's occupants have a choice to engage in a consensual encounter with police (either by speaking with the police and granting them consent or by refusing to speak with them and shutting the door) or to behave in an illegal manner (by destroying physical evidence, fleeing, or drawing their weapons). This Court should not reward illegal responses by preventing officers from responding to them. Such a test flies in the face of common sense and unduly restricts lawful police conduct. Police should not be restricted in their actions where a lawful citizen would not be.

In the end, there is no principled reason that *officers* should be deemed responsible – to have violated the Constitution – because *suspects* chose to commit the crime of destroying evidence. It is the suspect's unlawful reaction to lawful police action that causes an exigency to arise. See *United States v. MacDonald*, 916 F.2d 766, 771 (2nd Cir. 1990) (en banc) *cert. denied*, 498 U.S. 1119 (1991) ("The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so."); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (stating that a suspect's reaction (fleeing from police) to lawful police conduct *creates an exigency* that the suspect should not be allowed to benefit from through invalidation of a search (warrantless entry)).

To the extent a foreseeability rule is intended to ferret out deliberate efforts by officers to avoid the

warrant requirement, it fails for several reasons. First, as discussed in Section D, *infra*, the subjective intentions of officers are irrelevant to the Fourth Amendment inquiry. Even if an officer approached a suspect in the street, or knocked on his door, with the intent of producing an exigent circumstance that would justify a warrantless seizure or entry, there would be no Fourth Amendment violation.

Second, such a rule wrongly assumes that if officers could foresee a particular reaction, they intended for that reaction to occur. However, most interactions with police officers do not give rise to exigent circumstances. See *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) ("[C]itizens will often react positively when police simply ask for their help as responsible citizens to give whatever information they may have to aid in law enforcement.") (quotation marks and brackets omitted). Common sense tells us that there is a wide gap between what officers might foresee as a possible response and what they deliberately intend to produce. Indeed, a look at the risks and benefits facing officers shows that a foreseeability rule is not needed to prevent officers from "misusing" the combination of consensual encounters and the exigent circumstances exception. As Judge Sutton has noted,

> When no one answers the door (even if the residents are home), when no one at the home is willing to talk about the matter or when no one at the home does anything incriminating, the investigation will have

> reached a conspicuously low point. The officers will have to leave, and the drug manufacturer will have the kind of warning that even the most elaborate security system cannot provide.

United States v. Chambers, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J. dissenting).

Knocking and announcing in the hope of creating an exigent circumstance is a gamble that no reasonable officer would be willing to take. The possibility that an officer might nonetheless attempt to do so does not justify establishing a sweeping, prophylactic foreseeability rule that would prevent officers from using commonplace, lawful police tactics such as knocking on doors and initiating conversations with suspects. Such a rule would perversely reward the suspect's unlawful response. Nonetheless, multiple circuits have adopted tests that improperly rely on foreseeability.[8] It would be a dangerous rule, in the absence of illegal police action, to hold that police can impermissibly create the exigent circumstances that allow for their warrantless entry, thus prohibiting entry in times of dire need.

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[8] The Fourth and Eighth Circuits improperly rely on a foreseeability test. See *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008) (holding that officers created the exigency because the results of their actions were foreseeable); *United States v. Duchi*, 906 F.2d 1278, 1284-1285 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995) (same).

C. An Officer With Probable Cause to Obtain a Warrant May Engage in Consensual Encounters Such as "Knocking and Talking"

In this case, the officers attempted to initiate a consensual encounter with suspects even though they had probable cause to obtain a warrant. Pet. App. 35a-37a, 39a, 46a-47a. This Court has never held that the existence of probable cause, which would entitle an officer to obtain a warrant authorizing search and/or seizure, forbids the officer from taking the lesser step of initiating a consensual encounter. Just the opposite.

In *Schneckloth*, 412 U.S. at 227-228, this Court held that:

> in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

Nor would a rule barring consensual encounters when officers have probable cause to obtain a warrant make sense. The Fourth Amendment is designed to

restrain the government in searching private residences. *Payton v. New York*, 445 U.S. 573, 585 (1980). It would be passing strange to construe it as requiring the government to conduct a search instead of a consensual encounter.

It would seem antagonistic of this principle to require law enforcement to obtain a search warrant and conduct a search, rather than attempting a consensual encounter. Indeed, such a rule would give officers *less* authority to speak with suspects, via a "knock and talk," when they have probable cause that a crime has or is occurring, than when the officers do not have probable cause. Yet law enforcement officers necessarily have more authority to act when they have probable cause of wrongdoing. Such a rule stands contrary to normal Fourth Amendment understanding.

Finally, a rule limiting officers' authority to engage in consensual encounters when they have probable cause to obtain a warrant would create serious practical problems. It is often unclear whether officers' possess the requisite showing of probable cause to obtain a search warrant. This Court has specifically refused to require officers to guess when probable cause has arisen and, in fact, has held that there is "no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). See also *Cardwell v. Lewis*, 417 U.S. 583, 595 (1974) (stating that police need not obtain a warrant as soon

as they have probable cause and that exigent circumstances in vehicular searches need not be unforeseeable). An officer's determination of probable cause should not be open to questioning in hindsight by a reviewing court. See *Chambers*, 395 F.3d at 576 (Sutton, J. dissenting) ("making the manufactured-exigency exception applicable whenever courts (though not the police) conclude that probable cause existed before the encounter would create a peculiar rule in which searches could be invalidated either because the police did not have probable cause or because they did"). All told, "the law should permit continued reasonable investigation, allowing police to gather more information and thus build a stronger evidentiary case." Bryan Abramsoke, *It Doesn't Matter What They Intended: The Need for Objective Permissibility Review of Police-Created Exigencies in "Knock and Talk" Investigations*, 41 Suffolk U.L. Rev. 561, 581 (2008).

A test that questions police timing based upon the availability of a search warrant is unsatisfactory. However, multiple circuits have adopted just such a test.[9] Such a test places a heavy burden on officers to

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[9] The First, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits adopted tests that ask whether officers unreasonably delayed in obtaining a warrant, after probable cause existed. See *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988) (holding that officers cannot rely on exigencies that arise if the officers unreasonably delayed in obtaining a warrant); *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002) (same); *United States v. Dowell*, 724 F.2d 599 (7th Cir. 1984)

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immediately obtain a warrant once probable cause has arisen, even when other lawful courses seem preferable based on the circumstances and the officers' experience. It also means that evidence can be suppressed when a reviewing court, in hindsight, determines that probable cause existed prior to exigent circumstances arising, even though officers at the scene did not believe they had probable cause to obtain a warrant. Any assertion that there are no further legitimate reasons for investigation by officers once probable cause is said to be found is purely speculative. It is this speculation that unmoors a timing of probable cause analysis from the touchstone of Fourth Amendment analysis and looks at subjective intentions rather than objective reasonableness.

D. Subjective Intentions Are Irrelevant in Assessing Whether Officers' Actions Violate the Fourth Amendment

The Kentucky Supreme Court held that "courts must [first] determine whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement." Pet.

(same); *United States v. VonWillie*, 59 F.3d 922 (9th Cir. 1995) (same); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991) (same); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc) *cert. denied*, 502 U.S. 907 (1991) (same); *United States v. Socey*, 846 F.2d 1439 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 858 (1988) (same).

App. 45a-46a (internal citation and quotation marks omitted). That rule, also adopted by multiple circuits,[10] departs from this Court's longstanding rule that "[t]he officer's subjective motivation is irrelevant" to the Fourth Amendment inquiry. *Brigham City*, 547 U.S. at 404-405.

As this Court made clear in *Whren v. United States*, 517 U.S. 806, 813 (1996),

> the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

(Internal quotation marks omitted).

The Court has applied this rule in a variety of Fourth Amendment contexts. For example, in *Bond v. United States*, 529 U.S. 334 (2000), this Court held that the law enforcement officer's physical manipulation of the defendant's carry-on bag on a bus violated the Fourth Amendment. In so holding, this Court

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[10] The Third and Fifth Circuits improperly inquire as to the bad faith subjective intentions of officers. *See United States v. Coles*, 437 F.3d 361 (3rd Cir. 2006) (holding that officers cannot evade the warrant requirement in bad faith and then rely on any exigencies that arise); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004) (same).

noted that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Id.* at 339 n. 2 See also *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (an officer's "subjective reason for making the arrest" need not coincide with facts providing probable cause); *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996) (an officer's subjective intent has no impact on the reasonableness of duration of a traffic stop); *Whren*, 517 U.S. at 813 (an officer's subjective intentions have no place in Fourth Amendment analysis); *Florida v. Jimeno*, 500 U.S. 248, 250-252 (1991) (an officer's subjective intentions in conducting a consensual search does not limit the scope of the search); *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (an officer's subjective intentions in conducting surveillance from a particular vantage point does not render the evidence obtained invalid); *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3 (1983) (an officer's subjective intentions in conducting a brief, suspicionless detention of a ship for a documentation check does not invalidate any evidence obtained via the stop).

This rule does not cease to exist simply because this Court is analyzing a case involving exigent circumstances. Objective reasonableness, absent any subjective motivation of the officer, continues to be the standard when dealing with exigent circumstances cases. This Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search

is objectively reasonable." *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548 (2009) quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

This Court adopted the objective standard for exigent circumstance cases over an explicit request to delve into the officer's subjective intent. For example, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006), the respondents urged this Court "to consider, in assessing the reasonableness of the entry, whether the officers were 'indeed motivated primarily by a desire to save lives and property.'" This Court noted, however, that its "cases have repeatedly rejected this approach." *Id.* Rather, "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Id.* quoting *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis in original). See also *Bond v. United States*, 529 U.S. 334, 338, n. 2 (2000) ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[O]ur prior cases make clear" that "the subjective motivations of the individual officers . . . ha[ve] no bearing on whether a particular seizure is

'unreasonable' under the Fourth Amendment").[11] In fact, this Court emphasized its distaste for subjective-based tests in *United States v. Leon*, 468 U.S. 897 (1984), when it stated that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Id.* at 923, n. 23, quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting). Thus, a test that looks to the subjective intent of officers under the particular circumstances of this case is invalid.

Injecting a subjective element into the Fourth Amendment's reasonableness inquiry for exigent circumstances to prevent the destruction of evidence would not only contravene precedent, it would also invite inconsistent and unpredictable application and chill sound police practices. Subjective inquiries

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[11] This Court has routinely found the subjective intent of law enforcement to be irrelevant. See *Missouri v. Seibert*, 542 U.S. 600, 623 (2004) (O'Connor, J., dissenting) (agreeing with the plurality's decision not to consider the subjective intent of the interrogating officer and instead to formulate an objective test); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the actual motivations of individual officers do not affect the constitutional reasonableness of traffic stops); *Horton v. California*, 496 U.S. 128, 138 (1990) (stating, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); *Scott v. United States*, 436 U.S. 128, 136-138 (1978) (rejecting a "good faith" exception and focusing instead on the police officers' actions, not their motives).

necessarily import variability and instability into the law. Officers on the ground can have little confidence that the judicial reconstruction of motives months later "in the peace of a judge's chambers" and "with the 20/20 vision of hindsight" will vindicate the hurried judgments they were forced to make with limited information and seconds to deliberate. *Graham v. Connor*, 490 U.S. 386, 396 (1989). When, as often occurs multiple officers with potentially multiple motives are involved, the inquiry becomes exponentially unwieldy. See *United States v. Leon*, 468 U.S. 897, 923 n. 23 (1984) ("sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources") (internal quotation marks omitted).

Moreover, if a subjective test were applied, the "constitutionality of an [entry] under a given set of known facts will 'vary from place to place and from time to time.'" *Devenpeck*, 543 U.S. at 154 (quoting *Whren*, 517 U.S. at 815). This would make the Fourth Amendment's protection "arbitrarily variable." *Id.* at 154. Case law will offer little or no reliable guidance to officers who are "forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving" about the appropriateness of a search and entry. *Graham*, 490 U.S. at 397.

Given that an erroneous judgment by officers may result in both the suppression of evidence and exposure to personal liability for the constitutional violation, the inevitable consequence of such instability and complexity in the law will be hesitation by

officers on the scene, which could lead to serious consequences. There is no discernible constitutional gain in having the lawfulness of entries turn upon later-litigated subjective purposes. If the objective circumstances point to an exigency and officers enter to quell that exigency, the infringement on privacy is identical regardless of the subjective state of mind of the individual officers.

Accordingly, there is no basis for undertaking an inquiry into subjective motives when officers make an entry based on circumstances that reasonably indicate the existence of an emergency. In the context of exigent-circumstances entries, the central Fourth Amendment goal of avoiding arbitrary police intrusions is met by considering whether the facts known to the officer, viewed objectively, support a reasonable belief that a crime has been, is being, or is about to be committed, and whether the objective facts support immediate action. The Kentucky Supreme Court erred in adopting a subjective test that looks to officers' subjective reasons for knocking and talking, and then entering the apartment.

For this same reason the varied tests employed by all of the circuits, except for the Second Circuit (discussed *infra*), are also improper. Each of the other circuits' tests improperly adhere to a subjective determination of an officer's intentions. These circuits' tests, whether examining foreseeability, the timing of probable cause, or bad faith, all stand

contrary to Fourth Amendment analysis.[12] The only test adopted by the lower courts that is proper, under this Court's analysis of Fourth Amendment protections, is the Second Circuit's "lawfulness" test.

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[12] Each of the tests set forth by the other circuits has a subjective intent component necessitating that courts examine an officer's intentions. Several of the circuits attempt to insulate their subjective analysis by enforcing it under the guise of "timing" or "foreseeability." However, even ignoring the subjective analysis involved in these tests, neither "timing" nor "foreseeability" should be determinative of when officers impermissibly create exigent circumstances. See Argument I(C), *supra*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-228 (1973); Argument I(B), *supra*; *Horton v. California*, 496 U.S. 128, 138 (1990). These components run afoul of this Court's well-settled Fourth Amendment analysis. See Katherine A. Carmon, *Don't Act Like You Smell Pot! (At Least, Not In The Fourth Circuit): Police Created Exigent Circumstances In Fourth Amendment Jurisprudence*, 87 N.C.L. Rev. 621 (2009) (discussing that every circuit other than the Second Circuit, relies on a subjective test). Seminal cases from each circuit include: *United States v. Rengifo*, 858 F.2d 800, 804 (1st Cir. 1988); *United States v. Coles*, 437 F.3d 361, 370-372 (3rd Cir. 2006); *United States v. Mowatt*, 513 F.3d 395, 400-403 (4th Cir. 2008); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) *cert. denied*, 543 U.S. 955 (2004); *Ewolski v. City of Brunswick*, 287 F.3d 492, 504 (6th Cir. 2002); *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980) abrogated on other grounds by *Dowling v. United States*, 473 U.S. 207 (1985); *United States v. Duchi*, 906 F.2d 1278, 1284-1285 (8th Cir. 1990) *cert. denied*, 516 U.S. 852 (1995); *United States v. VonWillie*, 59 F.3d 922, 926 (9th Cir. 1995); *United States v. Carr*, 939 F.2d 1442 (10th Cir. 1991); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991) (en banc) *cert. denied*, 502 U.S. 907 (1991); *United States v. Socey*, 846 F.2d 1439, 1449 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 858 (1988).

E. Police Do Not Impermissibly "Create" Exigent Circumstances When They Act in an Objectively Reasonable or Lawful Manner

The foregoing discussion demonstrates that the test set forth by the Kentucky Supreme Court – reliance on bad faith subjective intentions and police foreseeability – is improper. It also demonstrates that the various tests adopted by the majority of the lower courts are also improper. The proper test is the simple, one-step inquiry adopted by the Second Circuit: did the police act in a lawful manner? *United States v. MacDonald*, 916 F.2d 766, 772 (2nd Cir. 1990) (en banc) *cert. denied*, 498 U.S. 1119 (1991) ("when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances.").

This test is based upon objective standards and allows law enforcement to interact with citizens, just as citizens would interact with one another. This allows officers freedom in their lawful investigatory practices and provides a clear rule of what activities are permissible under Fourth Amendment analysis. It means that lower courts are not asked to delve into the subjective intentions of officers, but only to address the officers' actions at face value. And it does not force officers to second-guess decisions, hesitate, or abort lawful investigatory practices for fear of a court later determining, in hindsight, that their actions were impermissible. This objective test also enables easier governance and uniform, thorough, protection of Fourth Amendment rights – for, as

Judge Sutton noted, "the traditional rules governing the exigent-circumstances exception" address any concern about "undermining the warrant requirement." *Chambers*, 395 F.3d at 576.

It is this face value, objective analysis that this Court has routinely set forth when analyzing Fourth Amendment protections. See *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548 (2009). See also Argument I(D), *supra*. This simple question of whether police acted lawfully provides a clear and precise guidepost for officers and courts alike when determining whether police impermissibly created exigent circumstances. This "lawfulness" test, as set forth by the Second Circuit, is simply an adoption of this Court's general practice of analyzing Fourth Amendment inquiries under an objective reasonableness lens. This test flows from this Court's prior analysis as discussed above. See Argument I(A)-(D), *supra*. In this context, lawful actions are necessarily reasonable within the meaning of the Fourth Amendment when there is no evidence of coercion. When, as here, there can be no coercion because the suspect did not answer his door, lawful actions must necessarily also be objectively reasonable.[13] So long as each individual

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[13] It should be of no importance whether police could have obtained a warrant or what their subjective intentions were when approaching a door for a "knock and talk." What should be important for Fourth Amendment protection is whether police acted lawfully in conducting their "knock and talk" and attempting to gain consent for entry. When no one answers a door, it is immaterial whether police have arrived with weapons drawn or

(Continued on following page)

step taken by the officers is lawful they cannot amount to unreasonable action within the meaning of the Fourth Amendment when viewed collectively.

F. The Evidence in This Case Should Not Have Been Suppressed

For the reasons discussed in Sections (A)-(D), the evidence found by the officers following their entry into Respondent's apartment should not have been suppressed. None of the officers' actions in this case were unlawful. The officers here, while investigating a fleeing felon, lawfully knocked and announced themselves at what they believed to be the door into which the felon fled. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. The officers neither demanded entry nor threatened the occupants, but merely announced that the police were at the door. J.A. 21-24. After receiving no response to their knock and announce, it was at that point that the officers heard noises consistent with the destruction of physical evidence and forced entry to prevent the destruction of crack cocaine and possibly marijuana. J.A. 23-25, 40-43, 45-47. Officers also conducted a protective sweep in an effort to

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peacefully, those facts impact the validity of consent when someone answers the knock. When no one answers a knock, no coercion can occur, and as such, the subjective intentions of police officers are immaterial to a discussion of whether their action in knocking on a citizen's door and attempting to engage them in conversation is objectively reasonable. It should only matter that, when the citizen does not answer his door, that the officer's actions were lawful in knocking.

locate the fleeing felon that they had been pursuing. J.A. 24-28, 63-65. All of these actions are lawful and reasonable under proper Fourth Amendment analysis. None of the officers' actions in knocking on the Respondent's door and effecting warrantless entry in reaction to the exigency of destruction of physical evidence were unlawful, and therefore the culmination of those actions was objectively reasonable under a simple "lawfulness" test. As such, these two reasonable actions – knocking and announcing; and warrantless entry in response to the destruction of physical evidence – did not transmogrify into unreasonable conduct in violation of the Fourth Amendment. Neither the possibility that the officers might have foreseen that the apartment's residents would react by trying to destroy the evidence, nor the existence of probable cause to obtain a search warrant, barred them from knocking on Respondent's door to initiate a consensual encounter. Finally, the officers' subjective intent in knocking on the Respondent's door is also irrelevant to assessing whether their actions violated the Fourth Amendment. As such, the exigent circumstance that arose when the Respondent and his co-defendants reacted to the police presence by attempting to destroy physical evidence, were not impermissibly created by the officers' lawful knock and announce.

CONCLUSION

For the reasons stated above, the opinion and judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

Supreme Court, U.S.
DEC 13 2010
OFFICE OF THE CLERK

No. 09-1272

IN THE

Supreme Court of the United States

KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

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QUESTION PRESENTED

Three uniformed officers entered an apartment complex in pursuit of a cocaine dealer. The officer in charge of the investigation knew which apartment the cocaine dealer entered, but his attempt to relay that information to the uniformed officers was unsuccessful. The uniformed officers lost track of the cocaine dealer and had no idea which apartment, of a number of possible apartments, he had entered. Midway down the breezeway leading to those apartments, the uniformed officers detected the odor of burnt marijuana. They believed that the odor emanated from Mr. King's apartment, so they banged on the door as loudly as they could, announced either "Police, police, police," or "This is the police," and they demanded to be let inside. As soon as they started banging, the uniformed officers heard "people moving around" inside so they kicked in the door and searched the apartment. The question presented is:

May officers in the field rely solely on the sound of "people moving around" in response to their loud banging on the door, announcement of "Police, police, police" or "This is the police," and demand to be let inside in order to justify an exigency and thus a warrantless entry by kicking the door in?

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STATEMENT OF THE CASE

This case is about the warrantless, forcible, nighttime entry into a home to prevent the destruction of whatever evidence might still exist of a completed, nonviolent, victimless, misdemeanor offense.

The police suspected that someone inside Mr. King's apartment had recently smoked marijuana and they speculated that additional evidence of marijuana possession might exist. They banged on the door as loudly as they could, announced their presence, and demanded to be let inside. As soon as the police started banging, they heard "people moving around" so they kicked in the door and searched the apartment. The Commonwealth claims that this search was justified by the exigent circumstances exception to the warrant requirement. Pet. BOM 17.

The warrantless search of a home is presumptively unreasonable, and the Commonwealth has failed to carry its "heavy burden" of rebutting that presumption. The odor of burnt marijuana did not authorize the officers to demand entry into Mr. King's apartment, and the unremarkable sound of "people moving around" in response to the officers' banging and demand to be let inside did not suggest that the destruction of evidence was imminent or underway. With at least equal probability, the sound of "people moving around" suggested that someone was attempting to comply with the officers' demand to be let inside. There was no exigency. The police were not excused from obtaining a warrant.

Alternatively, even if this Court were to decide that the odor of burnt marijuana and "people moving around" supported the conclusion that exigent

circumstances existed – a conclusion Mr. King vigorously contests – the exigency was one of the officers' own creation. When the police engage in conduct that would cause a reasonable person to believe that entry into the home was imminent and inevitable, the police cause the occupant to "move." The Commonwealth may not then rely on that "movement" as a justification for a warrantless search.

FACTUAL BACKGROUND

At around 9:50 p.m. on October 13, 2005, the Lexington Police kicked in the door to Mr. King's apartment. They did not have a warrant.

The events that night began when a person sold cocaine to an informant outside of Mr. King's apartment complex. Pet. App. 2a, 35a. An undercover police officer radioed to several other uniformed officers, who were waiting nearby, that the cocaine dealer entered the back right apartment of the complex. Pet. App. 2a, 35a. The uniformed officers heard only part of the radio broadcast. They did not hear (and did not independently know) which apartment the cocaine dealer entered. Pet. App. 2a, 35a. As the uniformed officers proceeded down the breezeway of the apartment complex, they heard a door slam. Pet. App. 2a, 35a. But, the officers did not know which apartment door they heard shut, and they did not know which apartment the cocaine dealer entered. Pet. App. 3a, 35a.

Midway down the breezeway, the uniformed officers detected the odor of burnt marijuana, which they believed emanated from the back left apartment. Pet. App. 2a, 35a. Officer Cobb, who was the only witness to testify at the hearing on Mr. King's motion

to suppress, gave the following account of what happened next:

> As we got into the hallway, about midway, there was a very strong odor of burnt marijuana inside the breezeway.
>
> As we got closer to back left apartment, we could tell that it seemed to be the source of that, almost as if the door had been slammed right there.
>
> Detective Maynard made contact with the door, announced our presence, banged on the door as loud as we could, announced, "Police, police, police."

J.A. 22. In response to further questioning by the prosecutor about exactly how the officers' announced their presence at the door, Officer Cobb testified:

> Detective Maynard banged on the door, said, "This is the police."

J.A. 23. Officer Cobb explained what happened next:

> As soon as we started banging on the door, Detective Maynard turned to Sergeant Simmons to let him know that we could hear people inside moving. It sounded as – things were being moved inside the apartment. ...
>
> * * * * *
>
> We knew that there was possibly something that was going to be destroyed inside the apartment.
>
> At that point, Detective Maynard, with the – Sergeant Simmons – and we explained to them we were going to make entry inside the apartment. Detective Maynard attempted to get

> the – to go – to enter through the door, wasn't able to, and that's when I entered to through the door.
>
> * * * * *
>
> I kicked the door open.

J.A. 24-25.[1] Mr. King and two other people were inside, one of whom was sitting on the couch still smoking marijuana. J.A. 25-26; Pet. App. 4a. The police observed marijuana on the coffee table in the middle of the room and cocaine sitting out on the kitchen counter. J.A. 27, 49-50; Pet. App. 4a-5a. After the occupants' arrest, a subsequent search of the apartment revealed additional drugs, drug paraphernalia, and $2,500 in cash. Pet. App. 5a.

The police later entered the back right apartment and arrested the cocaine dealer. Pet. App. 6a, 35a.

At the suppression hearing, the parties and the trial court asked Officer Cobb to explain what exactly he heard that lead him to believe that the destruction of evidence was imminent or underway. Initially, Officer Cobb testified:

> It sounded as – things were being moved inside the apartment.

J.A. 24. In response to further questioning by the trial court, Officer Cobb clarified that he "couldn't discern exactly" what it was that he heard after all:

> Q: When you were at the door of Apartment 78 and you said that you heard things being

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[1] The Solicitor General's claim that the police "knocked on the door...in an effort to gain voluntary cooperation from the occupants, and waited for a response" is misleading and wrong. S.G. Br. 20-21.

moved or heard movement inside the apartment, at first I thought you were talking about somebody moving furniture, but you're talking about people moving around?

A: Correct. Now, whether – Your Honor, whether they were moving furniture or things were being moved, we were just –

Q: I just – I just didn't know whether you were talking about the screeching of couches being moved on the floor or whether it was just – just foot traffic. That's all I was asking.

A: I couldn't discern exactly.

J.A. 58. Officer Cobb also candidly admitted that he believed only that the occupants of Mr. King's apartment were "possibly" destroying evidence. Officer Cobb testified:

Q: What did you-all do once you heard these things being moved around in the apartment?

A: We knew that there was possibly something that was going to be destroyed inside the apartment.

J.A. 24. Later, Officer Cobb reiterated:

Q: What was your basis for believing you could enter the apartment that these defendants were in?

A: There was a crime occurring inside and also possible destruction of evidence.

Q: And isn't it true that you actually wrote in your report that "We could hear persons inside that apartment and noises possibly consistent" – is that right – "possibly consistent with the

destruction of potential evidence"?

A: Yes, I wrote "possibly consistent with the destruction of potential evidence."

J.A. 40-41. Officer Cobb further acknowledged that as a matter of course, "people move in apartments" and that "[m]ost people answer the door when the police knock at the door also." J.A. 41.

The trial court made extensive, written findings of fact. Regarding the manner of entry, the trial court found:

> Det. Maynard, who was accompanying Officer Cobb in the breezeway attempting to locate and arrest the suspect in question, banged on the door of the apartment on the back left of the breezeway identifying themselves as police officers and demanding that the door be opened by the persons inside.
>
> * * * * *
>
> After Det. Maynard announced the presence of the police officers at the door...Officer Cobb and the others heard "things being moved in that apartment (78)".

Pet. App. 3a-4a (emphasis in original).[2]

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[2] The Commonwealth's assertion that, "[t]he officers neither demanded entry nor threatened the occupants, but merely announced that the police were at the door," is not a fair characterization of the record. The trial court specifically found – and Officer Cobb testified – that the officers' "banged on the door as loud as [they] could" and "demand[ed]" to be let inside. J.A. 22-24; Pet. 3a-4a.

Regarding the noises that Officer Cobb heard, the trial court found:

> After Det. Maynard announced the presence of the police officers at the door of the back left apartment, Apt 78, Officer Cobb and the others heard "things being moved in that apartment (78)". Officer later described the noise as people moving around as opposed to furniture being moved.

Pet. App. 3a-4a (emphasis in original).[3]

At the suppression hearing, counsel for Mr. King asked the prosecutor to "delineate" her theory of the case, *e.g.* whether the officers entered Mr. King's apartment in hot pursuit or to prevent the destruction of evidence. J.A. 71. The prosecutor responded:

> Officer Cobb testified here today that he entered the apartment based on the smell of marijuana that was coming from the apartment and the fact that he believed people were destroying evidence and he heard the movement inside.

J.A. 71.[4] Regarding the officers' reason for entering Mr. King's apartment, the trial court found:

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[3] The Commonwealth's assertion that, "the officers heard things inside the apartment being moved around," is also wrong. Pet. BOM 3. The trial court specifically found – and Officer Cobb testified – that he heard "people moving around." J.A. 58; Pet. 4a.

[4] The prosecutor did not mention hot pursuit for good reason. The undercover officer in charge of the investigation knew that the cocaine dealer did not enter Mr. King's apartment and he radioed that information to his fellow officers before Officer Cobb kicked down Mr. King's door, although Officer Cobb testified that he had not heard this information at the time.

> When asked directly to articulate the reasons which he thought justified the forced entry into Apt 78 (apartment on the back left of hall) by knocking down the door, Officer Cobb testified that he and the other officers thought that there was a crime occurring inside Apt 78 based on the strong odor of burnt marijuana being detected from under the door and, from the noise heard through the door, that its occupants were engaging in the destruction of evidence.

Pet. App. 6a. The trial court denied Mr. King's motion to suppress the evidence found inside his apartment. Pet. App. 24a. Mr. King entered a conditional plea of guilty to the charges of trafficking in a controlled substance, possession of marijuana, and persistent felony offender in the second degree. Mr. King was sentenced to serve eleven years in prison. He promptly appealed.

Mr. King emphasizes that the Commonwealth's strained characterizations of the record version of

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Pet. App. 35a. Neither the Commonwealth nor the Solicitor General address this fact or its collective knowledge implications in the briefing. *See e.g. United States* v. *Gillette*, 245 F.3d 1032, 1034 (8th Cir. 2001) ("Where officers work together on an investigation, we have used the so-called 'collective knowledge' theory to impute the knowledge of one officer to other officers.... Under this rationale, the validity of a search may be based on the collective knowledge of all of the law enforcement officers involved in an investigation if...come degree of communication exists between them." (internal citations omitted). Moreover, although Officer Cobb testified that the smell of marijuana may have indicated that a door had recently been opened, at bottom, the trial court found – and Officer Cobb repeatedly testified – that he did not know which apartment the cocaine dealer entered. J.A. 32, 59, 61-62; Pet. App. 3a, 5a, 6a, 8a, 36a.

events distorts the legal issues actually presented by this case. Despite the fact that the Kentucky Supreme Court rejected the Commonwealth's contention that the police entered Mr. King's apartment in pursuit of the cocaine dealer in the section of its opinion titled, "The Police Were Not In Hot Pursuit of a Fleeing Suspect," see Pet. App. 40a, and despite the fact that this Court rejected the Commonwealth's Second Question Presented, which pertained to the hot pursuit doctrine, see Pet. i, the Commonwealth clings to the notion that the police entered Mr. King's apartment in pursuit of the cocaine dealer in order to create the erroneous impression that the circumstances were truly exigent.

The Commonwealth claims: "Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police entered the [ ] apartment." Pet. BOM 3.

Any discussion about the cocaine dealer is a red herring. This is not a hot pursuit case.[5] This case is

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[5] The problem with the Commonwealth's hot pursuit claim – aside from the fact that it is *not* supported by the record – is that if the police were in hot pursuit, then their knocking would be of no legal consequence. *See Ker v. California*, 374 U.S. 23, 55 (1963) (Brennan, J., plurality opinion) (when the police are in hot pursuit, "pausing at the threshold to make the ordinarily requisite announcement and demand would be a superfluous act which the law does not require.") The reality is that while police may have been in pursuit of someone, Officer Cobb lost contact with that individual and did not know which apartment he had entered. See supra n.4. If the police entered Mr. King's apartment in pursuit of a cocaine dealer – a fact Mr. King vigorously contests – then any discussion about created exigencies or the destruction of evidence would be unnecessary.

about the warrantless, forcible, nighttime search of a home based on an officer's equivocal belief that the occupants were "possibly" destroying misdemeanor crime evidence.

PROCEDURAL HISTORY

The Kentucky Court of Appeals concluded that "because the police were pursuing a suspected felony crack cocaine dealer following a 'buy-bust' operation to a particular apartment building door and believing that the suspect was about to destroy evidence of a serious crime...the warrantless entry into Mr. King's apartment was valid." Pet. App. 24a.

The Kentucky Supreme Court reversed the judgment of the Court of Appeals. The court reviewed the record and found that the trial court's "findings of fact were supported by substantial evidence, and are therefore conclusive." Pet. App. 38a.

The court reiterated that pursuit of the cocaine dealer played no role in the officers' decision to forcibly enter Mr. King's apartment:

> As the circuit court noted in its findings of fact, when asked to articulate the reasons which he thought justified the forced entry, Officer Cobb testified that the officers thought (1) that a crime was occurring based on the strong odor of marijuana, and (2) that evidence was possibly being destroyed based on the sound of movement inside the apartment.

Pet. App. 36a. The court "assumed for the purpose of argument that exigent circumstances existed" in order to "proceed to the more important question of

whether police created their own exigency." Pet. App. 43a. The court then held:

> While probable cause existed for police to obtain a warrant to enter the apartment occupied by Mr. King, police did not have proper exigent circumstances to justify a warrantless entry. Police were not in hot pursuit of a fleeing suspect. Further, the entry was not justified by imminent destruction of evidence. The odor of marijuana alone did not provide a justification, and any exigency arising from the sounds of movement inside the apartment was created by police, and therefore cannot be relied upon as a justification.

Pet. App. 49. The court reversed the decision of the Court of Appeals, reversed the decision of the trial court, and remanded the case for further proceedings consistent with its opinion.

ARGUMENT SUMMARY

The facts of this case are indistinguishable from those in *Johnson* v. *United States*, 333 U.S. 10 (1948), this Court's seminal Fourth Amendment decision. The reasoning in *Johnson* and its extensive progeny is sound, and it controls the outcome here. Mr. King prevails regardless of which created-exigency test this Court adopts because the odor of burnt marijuana and the ambiguous, commonplace noise of "people moving around" inside the home do not support the inference that the destruction of evidence is imminent or underway.

Even if *Johnson* were not controlling, when the government relies on sounds as a basis for an officer's belief that the destruction of evidence is imminent or underway, evidence regarding those sounds must be

specific enough to enable a reviewing court to determine that the officer had an objectively reasonable basis for proceeding without a warrant. Testimony that the police heard "people moving around" is insufficient to rebut the strong presumption that a warrantless search of a home is unreasonable.

Moreover, any exigency was one of the officers' own creation. The police caused the occupants of Mr. King's apartment to "move around" when they loudly banged on the door, announced their presence, and demanded to be let inside. The Commonwealth is thereby precluded from relying on the "movement" that it caused as a justification for searching Mr. King's apartment without a warrant. In the context of a warrantless entry into the home, the police impermissibly create exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.

This Court should reject the Commonwealth's categorical "unlawfulness" test, under which the Commonwealth apparently asserts that an officer may lawfully bang on the door to a person's home and demand entry regardless of the circumstances. That test is tautological and fails to adequately protect the most fundamental of Fourth Amendment rights – the right to be secure in one's home. That test is ignores the basic requirement that a warrantless search must be strictly circumscribed by the exigency that justifies its initiation, and it provides no real guidance to the police or courts.

ARGUMENT

I. *JOHNSON* V. *UNITED STATES* CONTROLS THIS CASE.

On its facts and as a matter of rudimentary Fourth Amendment jurisprudence, this case is squarely controlled by *Johnson*, an opinion written by Justice Robert Jackson which this Court has cited more than one hundred times as a leading exposition of Fourth Amendment law. *Johnson's* holding has never been questioned; there is no reason to question it; this case should be affirmed on the authority of *Johnson* and its extensive progeny.

The facts of this case are identical to the facts in *Johnson*, except that in this case the police banged on the door as loudly as possible, demanded entry, and then forced their way inside. In *Johnson*, the police entered and searched a hotel room because they smelled the "distinctive and unmistakable" order of burning opium. After knocking on the door and announcing their presence, they heard "some 'shuffling or noise' inside the room." 333 U.S. at 12. This Court held that the search was unlawful:

> No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a moveable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.
>
> If the officers in this case were excused from

> the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

Id. at 15. This Court has repeatedly reaffirmed the reasoning in *Johnson* and should do so again here.

The Solicitor General suggests that the existence of probable cause to believe that a crime has occurred is a reasonable foothold on the slippery slope to a blanket rule that the sound of "people moving around" justifies a warrantless, forcible, nighttime entry into a person's home. Brief for the United States as Amicus Curiae in Support of Petitioner (S.G. Br.) 25. This Court rejected that argument in *Johnson*, and it has continued to reject that argument ever since. Criminal activity does not, without more, establish both probable cause and exigent circumstances. *Welsh* v. *Wisconsin*, 466 U.S. 740, 753 (1984) ("[N]o exigency is created simply because there is probable cause to believe that a serious crime has been committed.") *Payton* v. *New York*, 445 U.S. 573, 587-588 (1980) ("[A]bsent exigent circumstances, a warrantless [search for evidence] is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.")

The "plain smell" of incriminating evidence does not give rise to exigent circumstances, either. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971) ("Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."); *Taylor* v.

United States, 286 U.S. 1, 6 (1932) ("Prohibition officers may rely on a distinctive odor [of whiskey] as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees...against unreasonable search.")

If the odor of burnt drugs were enough to supply both the probable cause *and* exigent circumstances necessary to effectuate a warrantless entry into a person's home, then the Warrants Clause would be devoid of all meaning. Ex ante, the government could justify a warrantless search simply by presenting evidence that the officer in question was qualified to detect the odor of narcotics. Nothing more would be required. The potential for abuse and pretextual searches would be intolerably high.

Likewise, if the sound of "people moving around" without some nexus to the act of destruction can give rise to an objectively reasonable belief that evidence is being destroyed, then for all practical purposes, the police will have a per se exemption from seeking a warrant in drug cases. But see *United States* v. *Karo*, 468 U.S. 705, 717 (1984) (people suspected of drug offenses are protected by the Warrants Clause to the same degree as people suspected of nondrug offenses). The police will be able to kick down the door and forcibly enter almost any home they want after knocking, as long as they have probable cause and the person inside moves.

Johnson and its progeny instruct that ambiguous, commonplace household sounds do not suggest that the destruction of evidence is imminent or underway, and they do not justify the entry of a private residence without a warrant. This Court presumes that movement will follow an officer's knock at the

door. See *e.g. Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006) (the knock and announce rule "assures the opportunity to collect oneself before opening the door"); *Richards* v. *Wisconsin*, 520 U.S. 385, 393 n. 5 (1997) ("The brief interlude between announcement and entry...may be the opportunity that an individual has to pull on clothes or get out of bed.")

If "moving around" justifies a warrantless entry, then ordinary citizens can never be sure how to respond when the police knock at the door. See generally *New York* v. *Belton*, 453 U.S. 454, 459-460 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection"); *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001) ("The people in their houses, as well as the police, deserve...precision.") Officer Cobb stated the obvious when he testified that, in his experience, "[m]ost people answer the door when the police knock at the door." J.A. 41. If "movement" in response to a police presence suggests that the destruction of evidence is imminent or underway, which, in turn, justifies a warrantless entry, then the upshot of the Commonwealth's argument is that a person who wants to assert her Fourth Amendment rights should ignore the police and simply hope that they will go away.

If the Commonwealth prevails, the right to privacy and security in one's own home will hinge on an occupant's ability to remain frozen in place. In Judge Sutton's words, a criminal investigation "will have reached a conspicuously low point" only if no one inside the home ever moves. *United States* v. *Chambers*, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting). But that scenario is wholly

unrealistic and certainly should not apply to an innocent homeowner who arises from his or her couch to respond to police banging at the door. The result in all such instances is that the police can lawfully kick the door in.

This case illustrates perfectly why it would be misguided to permit a warrantless entry into a home based solely on probable cause and an officer's conjecture about the significance of ambiguous, commonplace sounds. The record reflects that everything Officer Cobb believed about the supposedly exigent nature of the situation was wrong. Officer Cobb's training and experience failed him. Nothing inside Mr. King's apartment corroborated his belief that the occupants attempted to destroy evidence. After the police kicked in the door to Mr. King's apartment, they found someone sitting on the couch smoking marijuana and narcotics evidence conspicuously located on the coffee table in the middle of the room and sitting out on the kitchen counter. J.A. 27, 49-50; Pet. App. 4a-5a. The people inside Mr. King's apartment made no attempt to conceal evidence, much less destroy it.

Even Officer Cobb lacked confidence in his own assessment about what the occupants of Mr. King's apartment might have been doing. Officer Cobb conceded that he "couldn't discern exactly" what he heard, and he candidly admitted that whatever he heard was only "possibly" consistent with the destruction of evidence. J.A. 40-41, 58. Officer Cobb equivocated for good reason. Who wouldn't "move around" if at night, the police "banged on the door as loud as [they] could," announced either "Police, police, police" or "This is the police," and "demand[ed] that

the door be opened by the persons inside"? J.A. 22; Pet. App. 3a-4a.

The Commonwealth has no answer to *Johnson* or its considerable progeny. The Commonwealth simply ignores *Johnson* altogether. *Johnson* is one of this Court's leading Fourth Amendment cases, it is indistinguishable from this case, and it controls the outcome here.

II. EVEN IF *JOHNSON* WERE NOT CONTROLLING, NONSPECIFIC TESTIMONY ABOUT AMBIGUOUS AND COMMONPLACE HOUSEHOLD SOUNDS IS INSUFFICIENT TO OVERCOME THE STRONG PRESUMPTION THAT THE WARRANTLESS SEARCH OF A HOME IS UNREASONABLE.

The exigent circumstances exception does not justify the warrantless entry into a private residence – forcibly and at night – simply because a police officer heard the sound of "people moving around" inside. It is "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable," *Payton*, 445 U.S. at 586 (internal quotation marks omitted), and the Commonwealth does not meet its "heavy burden" of overcoming that presumption without providing specific and articulable facts about what it was that caused them to believe an exigency existed. *Welsh*, 466 U.S. at 479-450.

The Commonwealth was required to demonstrate that Officer Cobb had an "objectively reasonable basis" for believing that the destruction of evidence

was imminent or underway. *Cf. Brigham City* v. *Stuart*, 547 U.S. 398, 400 (2006) (the emergency aid exception applies only when the police "have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury"). Officer Cobb's conclusory testimony about ambiguous and commonplace household sounds is insufficient to rebut the presumption of unreasonableness.

When the government relies on sounds to justify a warrantless search, the evidence it presents regarding those sounds must be specific enough to enable a reviewing court to conclude that the decision to forgo a warrant was objectively reasonable. Every time this Court has held that exigent circumstances justified a warrantless entry, the government has provided detailed information about what the police observed. See *e.g. Michigan* v. *Fisher*, 130 S. Ct. 546, 547 (2009) (the warrantless entry was justified to render emergency aid where the police found extensive property damage that appeared to be recent, blood on the hood of a truck and on one of the doors to the house, they observed respondent screaming and throwing things, and noticed that he had a cut on his hand); *Brigham City*, 547 U.S. at 400-02 (the warrantless entry was justified to render emergency aid where the police heard shouting and saw a juvenile hit an adult in the face, after which other adults tried to restrain the juvenile by pressing him against a refrigerator with such force that the refrigerator began moving across the floor); *United States* v. *Santana*, 427 U.S. 38, 40-41 (1976) (in this consolidated case, the warrantless entry was justified, *inter alia*, to prevent the destruction of evidence where, after one respondent saw the police, she attempted to retreat inside her home and as she

tried to pull away from police drugs fell to the floor, prompting the other respondent to try and make off with the drugs); *Warden* v. *Hayden*, 387 U.S. 294, 297 (1967) (the warrantless entry was justified by the hot pursuit exception where a cab driver followed a robbery suspect from the bank to a particular house on Cocoa Lane and then relayed that information to the police); *Schmerber* v. *California*, 384 U.S. 757, 758-759 (1966) (taking the petitioner's blood without a warrant was justified given the evanescent nature of blood alcohol evidence where the petitioner was at the hospital receiving treatment for injuries he suffered in an automobile accident, the police smelled liquor on his breath, and his eyes had a bloodshot, watery, glassy appearance).

Here, by comparison, Officer Cobb testified that he heard "people moving around" and that the noise was "consistent" with his "experience of people who do destroy evidence inside apartments or other structures when we're outside." J.A. 41. When pressed, Officer Cobb acknowledged that he "couldn't discern exactly" what he heard, and Officer Cobb conceded that whatever he heard was only "possibly" consistent with the destruction of evidence. J.A. 40-41, 58. Officer Cobb was unable to articulate any concrete characteristics about the sound that he heard that distinguished it from a person "collecting" herself by pulling on clothes or getting out of bed. Officer Cobb simply referred to his "experience" with "people who have destroyed evidence," without describing or explaining those experiences further. J.A. at 40-42. Officer Cobb's testimony that he thought evidence could be destroyed "[j]ust based upon the nature of what it is we were there for" has a truer ring. J.A. 24.

The Commonwealth failed to present sufficient evidence from which a reviewing court could conclude that Officer Cobb's belief that the occupants of Mr. King's apartment were "possibly" destroying evidence was objectively reasonable. Under the circumstances, it was at least as likely that the occupants "moved around" in an attempt to answer the door. The Commonwealth has failed to satisfy its "heavy burden" to rebut the presumption that the warrantless search of Mr. King's apartment was unlawful.

Every police-created exigency case necessarily presents two questions: (1) did an exigent circumstance exist and, *if so* (2) did the police impermissibly create the exigency. To avoid issuing an advisory opinion, this Court must answer the first question in the affirmative before proceeding to the second question. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345-46 (1936) (The Court has "no power to give advisory opinions."). Contrary to the Commonwealth's suggestion, this Court cannot simply assume that exigent circumstances existed. See Pet. Reply 3 ("This Court routinely grants *certiorari* to review legal issues that a lower court decided after assuming the existence of a predicate fact or legal conclusion."). For the remainder of this brief, Mr. King assumes *arguendo* that the sound of "people moving around" does not suggest that the occupants of his apartment were destroying evidence.

III. THE POLICE IMPERMISSIBLY CREATE EXIGENT CIRCUMSTANCES WHEN THEY ENGAGE IN CONDUCT THAT WOULD CAUSE A REASONABLE PERSON TO BELIEVE THAT ENTRY IS IMMINENT AND INEVITABLE.

Nothing in the historical record suggests that the Framers contemplated either warrantless searches to prevent the destruction of evidence or a test for evaluating manufactured exigencies. The Framers' intent is not conclusive of the issue here,[6] but this Court's case law is instructive.

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[6] Courts have always recognized exigent circumstances. See e.g. *Accarino* v. *United States*, 179 F.2d 456, 462 (D.C. Cir. 1949) (at common law, police were authorized to enter a residence to prevent threatened crimes of violence and quell disturbances of the peace). The notion that warrants or their execution might yield in emergency situations emerged as a doctrinal theme in early knock and announce cases. See *Wilson* v. *Arkansas*, 514 U.S. 927, 935-937 (1995) (collecting cases). But, the "destruction of evidence" species of exigency was not recognized as a basis for dispensing with the knock and announce rule until Prohibition. See Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Fourth Amendment Rights*, 75 B.U. L. Rev. 449, 464, n. 80 (1995) (collecting cases). The notion that destruction of evidence might justify dispensing with warrants altogether crystallized in 1948 with *Johnson*, 333 U.S. at 15 ("exceptional circumstances" did not justify the search because "[n]o evidence or contraband was threatened with removal or destruction"); *Trupiano* v. *United States*, 334 U.S. 699, 706 (1948), (the search was unlawful because "the property was not of a type that could have been dismantled and removed"); and *McDonald*, 339 U.S. at 454-55 (the warrantless search was unlawful because property was not "in the process of destruction nor...likely to be destroyed.")

When – as here – an officer conveys the impression that entry into the home is inevitable and imminent, the officer is acting as though he has a warrant. And, when "a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion – albeit colorably lawful coercion." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968). But, when an officer claims authority to search a home under a warrant, *and he does not actually have a warrant*, the situation is simply "instinct with coercion" that the law will not abide.

The police may not rely on the fruits of coercive conduct in order to justify their decision to forego a warrant. See *e.g. Williams* v. *United States*, 401 U.S. 646, 662 (1971) ("When coercion, impermissible under the Fifth Amendment, has actually produced an involuntary statement, we have invariably held that the fruits of that unconstitutional coercion may not be used to prosecute the individual involved for crime."); *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963) (a statement following an illegal arrest must be suppressed as a fruit of that arrest unless it results from "an intervening independent act of a free will," and is "sufficiently an act of free will to purge the primary taint of the unlawful invasion"); cf. *Kyllo*, 533 U.S. at 40 (information about the amount of heat emanating from the Commonwealth's house, which was obtained through an unlawful search using thermal imaging, could not be used to form the basis for probable cause to obtain a warrant for a subsequent search of the home).

Accordingly, in the context of a warrantless entry into the home, the police impermissibly create

exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.

In this case, despite the fact that he did not actually have a warrant, Officer Cobb and his fellow officers banged on the door to Mr. King's apartment as loudly as they could, announced themselves as police officers, and demanded that the occupants let them inside. Pet. App. 3a-4a. Officer Cobb's behavior would have caused a reasonable person to believe that forcible entry into the apartment was imminent and inevitable and that "submission to the law" was required. *Bumper*, 391 U.S. at 550 n. 14. Accordingly, the Commonwealth is precluded from relying on the fruits of the officers' conduct, *e.g.* the sound of "people moving around" inside the apartment, in order to justify the warrantless search of Mr. King's home.

The analysis focuses on what a reasonable person would infer about police conduct – what the police subjectively intended is irrelevant, see *Brigham City*, 547 U.S. at 404 – considering the totality of the circumstances. The distinguishing feature between the investigative tactic known as a "knock and talk" and what the police did in this case is not simply the intensity of the officers' knock. The totality of the circumstances, *i.e.*, loud banging, announcement in the form of either "Police, police, police" or "This is the police," and a demand to be let inside, are all relevant.

The job for a reviewing court is simply to determine whether the police had a warrant and, if not, whether, under the totality of the circumstances, a person would reasonably believe that entry into his or her home was imminent and inevitable. This task is

familiar. Courts are routinely called on to determine how a person would interpret, and respond to, a challenged police action. See *e.g. United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (the test for evaluating when a seizure occurs is, *inter alia*, whether, in light of all the surrounding circumstances, "a reasonable person would have believed that he was not free to leave.").

Because Officer Cobb and the other officers manufactured the exigency, the Commonwealth may not rely on the exigent circumstances exception to justify the warrantless search. *Cf. Santana*, 427 U.S. at 45 (Marshall, J., dissenting) (courts should consider whether "police conduct was justifiable or was solely an attempt to circumvent the warrant requirement.").

Although Mr. King proposes an alternative to the Kentucky Supreme Court's foreseeability test, it is worth noting that the Commonwealth's critique of that test proves too much.[7] If an officer reasonably conveys to the occupant of a home that any resistance will be futile and that a forcible entry is imminent and inevitable, then it should come as no surprise that some occupants may respond by destroying evidence. Yet the Commonwealth would have this Court draw such an inference for all cases, so that once the police have alerted the occupants of a home to their presence, the sound of "people moving around" is sufficient to support the conclusion that the occupants were destroying evidence and an

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[7] The Question Presented fairly invited the articulation of the proper test for evaluating when and under what circumstances the police create exigent circumstances. Respondent is not limited to discussing the merits of the test proposed by the Kentucky Supreme Court.

exigency therefore exists. Put differently, what is foreseeable in some cases justifies a rule of entry in all cases.

IV. THE COMMONWEALTH'S "UNLAWFULNESS" TEST CONTAINS NO IDENTIFIABLE LIMIT ON POLICE ACTIVITY AND STRETCHES THE EXIGENT CIRCUMSTANCES EXCEPTION TOO FAR.

The Commonwealth's "unlawfulness" test is so permissive that it threatens to abrogate all Fourth Amendment protection for the home aside from probable cause. Yet, even as to that slim qualification, the Commonwealth would preclude any real review. Pet. BOM 25 ("An officer's determination of probable cause should not be open to questioning in hindsight by a reviewing court.")

Neither the Commonwealth nor it's amici offer any examples of how the unlawfulness test might serve a balancing function. The Commonwealth itself offers no examples of conduct that might violate the rule. The Solicitor General offers only citations to circumstances that are clearly inapposite because, among other distinguishing factors, they do not involve unlawful entry of the home. S.G. Br. at 11-12. In reality, the Commonwealth's unlawfulness test is a tautology: In all cases a motion to suppress will be denied so long as police are credited with having heard indistinct sounds of people moving around in response to their knocking at the door.

The unlawfulness test further represents a way for the Commonwealth and the Solicitor General to work an implicit overruling of *Richards*, 520 U.S. at 392.

In that case, the Solicitor asked this Court to adopt a "blanket exception" to the knock and announce rule in "felony drug cases" "because of...the destruction of [evidence]." *Richards*, 520 U.S. at 392. Having lost that argument in the context of the "knock and announce," the government now asks this Court to adopt the same rule in the context of warrantless entry, so that police would have a "blanket exception" to the warrant requirement where drugs are suspected and "sounds of people moving around" are heard in response to the police knocking at the door. See S.G. Br. 23 ("The fact that the police are searching for drugs that are easily disposable is sufficient to warrant a reasonable belief that the officers will face a significant risk of destruction of evidence if they allow a grace period to the occupants of the dwelling."); see also Pet. BOM 18-22.

The Commonwealth's categorical "unlawfulness" test fails for the same reason that the government's "blanket rule" failed in *Richards*. Both arguments ignore the balancing that the Fourth Amendment requires. See *e.g. Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996) ("[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) ("There is no formula for determining reasonableness. Each case is to be decided on its own facts and circumstances.")

Nor can a categorical "unlawfulness" test be reconciled with the fundamental principle that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry* v. *Ohio*, 392 U.S. 1, 25-26 (1968). The "method of law enforcement" must be commensurate with the

government's interests. *Welsh*, 466 U.S. at 751 (quoting *McDonald* v. *United States*, 335 U.S. 451 459-460 (1948) (Jackson, J., concurring)). For example, in *Illinois* v. *McArthur*, 531 U.S. 326 (2001), the police believed that the respondent might destroy evidence relating to the crime of marijuana possession, so they prevented him from entering his home while they all waited outside for a magistrate to issue a search warrant. *Id.* at 331. This Court approved of what they police did because they "tailored" their response to the goal of preserving evidence and "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by "preventing McArthur only from entering the trailer unaccompanied," thereby leaving "his home and his belongings intact." *Id.* at 331-332.[8]

The facts of this case illustrate perfectly a why this Court should reject a categorical rule that permits the police to do whatever they want as long as each individual act is "lawful." Even assuming exigent circumstances, the warrantless, forcible, nighttime entry into a residence to protect persons suspected of an offense that did not "endanger life or security," "displays a shocking lack of all sense of proportion." *Welsh*, 466 U.S. at 750-751 (quoting *McDonald*, 335 U.S. at 459-460 (Jackson, J., concurring)).

The Commonwealth offers no explanation as to why the forcible, nighttime entry into Mr. King's home was a reasonable and measured response to prevent the destruction of evidence relating to a completed, nonviolent, victimless, misdemeanor offense. It was

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[8] In *McArthur*, this Court specifically reserved the question of whether the government's interest in preventing the destruction of evidence relating to marijuana possession could ever justify a warrantless entry into a home. 531 U.S. at 336.

not. See William Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 748 (2009) ("Second to the requirement for specificity in warrants, the hidden unconstitutionality of nocturnal searches was the most certain feature of the amendment's original understanding. ... The creators of the amendment did not renounce all searches without a warrant, but they impliedly renounced all searches on land at night, whether by warrant or without."); see *also Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (exigent circumstances did not justify the warrantless search of a home because the police guard at the apartment minimized the possibility that homicide evidence would be destroyed); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) (exigent circumstances did not justify the warrantless search of a home because "the officers admit they could have easily prevented [the] destruction or removal [of narcotics evidence] merely by guarding the door."); *and* Pet. App. 40a-41a (the Kentucky Supreme Court found that: "Nothing...would have made it impracticable for the police to post officers in the breezeway and obtain a warrant.")

Moreover, to the extent that the "unlawfulness" test allows for any balancing at all, it assigns that task to the individual police officer rather than a neutral and detached magistrate. Such a shift contravenes this Court's precedent. *E.g.*, See *McDonald*, 335 U.S. at 455-456 (The Fourth Amendment "has interposed a magistrate between the citizen and the police...so that an objective mind might...pass on the desires of the police before they violate the privacy of the home."). Privacy and security in one's home – the "central concern underlying the Fourth Amendment" – is "too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of

criminals." *Arizona* v. *Gant*, 129 S. Ct. 1710, 1720 (2009); *McDonald*, 335 U.S. at 455-456.

Entrusting the police to protect the sanctity of the home is particularly problematic where the police are given no meaningful guidance. See *Kyllo*, 533 U.S. at 40 ("The Fourth Amendment draws 'a firm line at the entrance of the house,' " which "must be not only firm but also bright," providing "clear specification" to the police). Simply commanding the police to "be lawful" is neither helpful nor informative. The Commonwealth provides very little information about how its test would actually work, and it articulates no limit on what the police may, or may not, do. Apparently the Commonwealth would have this Court hold that the police may bang as loudly as possible on a person's door, at night, and demand entry, as long as the individual officer believed that his actions were "lawful."

The Commonwealth devotes much of its brief to a straw man argument about the lawful component parts of an investigative technique known as a "knock and talk." Pet. 12-18; 23-26. The police do not offend the Fourth Amendment simply by knocking on a person's door and Mr. King does not contend otherwise. But, that is not what happened here.

Likewise, the notion that the police "attempted to initiate a consensual encounter with [the] suspects," is legally unsupported and factually inaccurate. Pet. BOM 23. When an officer conveys the impression that entry into the home is imminent and inevitable, the officer is acting as though he has a warrant. And, "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the

search" and "there cannot be consent." *Bumper*, 391 U.S. at 550.

The Commonwealth has failed to satisfy its "heavy burden" of rebutting the presumption that the warrantless search of Mr. King's apartment was unreasonable. The Kentucky Supreme Court correctly suppressed the evidence in question.

CONCLUSION

This Court should affirm the decision of the Kentucky Supreme Court.[9]

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[9] The Solicitor General argues that this case should be remanded for a finding of whether exigent circumstances existed. S.G. 26-27 n. 5. The Commonwealth has already had ample opportunity to present whatever evidence it wanted in support of the officers' warrantless search. The Solicitor General has failed to explain why a remand would amount to anything other than a second bite at the apple for the Commonwealth.

Respectfully submitted,

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RESPONSE

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No. 09-1272

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

HOLLIS DESHAUN KING,
Respondent.

On a Writ of Certiorari to the Supreme Court of Kentucky

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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SUMMARY OF RESPONSE

This Court granted the Commonwealth's Petition for Writ of *Certiorari* on September 27, 2010. On October 28, 2010, Respondent filed a motion to dismiss this Court's *Certiorari* grant as improvidently granted. Respondent claims the case is now moot because the Fayette County Circuit Court dismissed the case prior to this Court's grant of *Certiorari*. (Motion to Dismiss (Motion), p. 5). Next, Respondent argues that the Fayette Circuit Court's dismissal amounted to an adjudication on the merits so that further prosecution is barred by double jeopardy. (Motion, p. 5). Finally, Respondent claims the case is not ripe for review. (Motion, p. 5). Respondent's claims are meritless. Just because the Fayette Circuit Court dismissed Respondent's case prior to this Court's grant of *Certiorari* does not render the case moot. *United States v. Villamonte-Marquez*, 562 U.S. 579 (1983). The claim is, therefore, ripe as well. Moreover, double jeopardy concerns are not present here since a reversal by this Court of the Kentucky Supreme Court's opinion would have the effect of reinstating Respondent's judgment of conviction. *Id.*, 562 U.S. at 581 n. 2.

FACTS AND PROCEDURAL HISTORY

1. This case made its way through the Kentucky appellate system based on a conditional guilty plea wherein Respondent reserved the right to appeal the trial court's denial of his motion to suppress evidence

seized from his apartment.[1] At issue in the case was "whether exigent circumstances existed, which justified the warrantless entry of the apartment occupied by [Respondent]." *King v. Commonwealth*, 302 S.W.3d 649, 651 (Ky. 2010). The Kentucky Supreme Court determined that "with regard to the imminent destruction of evidence, any exigency was police-created." *Ibid.* Therefore, the Kentucky Supreme Court reversed the denial of Respondent's motion to suppress and vacated Respondent's judgment of conviction. *Id.* at 657. The Court further remanded the case to the circuit court "for proceedings consistent with" the Kentucky Supreme Court's opinion. *Ibid.* The opinion of the Kentucky Supreme Court was issued on January 21, 2010, and became final twenty days later on February 11, 2010.

2. Following the Kentucky Supreme Court's opinion, the Commonwealth began drafting a Petition for Writ of *Certiorari* with this Court. The due date for the

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[1]At the outset it would be helpful to explain to the Court that Kentucky operates as a unified prosecutorial system. Local prosecutors and local public advocates handle the case at circuit court, Kentucky's trial court level. Once an appeal is filed, the Attorney General's Office, Office of Criminal Appeals, represents the Commonwealth. The Department of Public Advocacy has a similar appellate division that handles all appeals for indigent defendants. If a case is remanded to circuit court, the local prosecutor assumes control over the case once again. Ordinarily, the local public advocate likewise assumes control over the case on behalf of the defendant.

Petitioner's Writ was April 21, 2010. Petitioner filed its Petition with this Court on April 19, 2010.

3. While the Office of Attorney General was drafting the Petition for Writ of *Certiorari*, the Fayette Circuit Court, unbeknownst to the Attorney General's office, docketed Respondent's case on remand.[2] At a hearing on March 4, 2010, the Fayette Circuit Court then granted Respondent's motion to suppress. Having had the evidence suppressed, the Commonwealth, via the local prosecutor, moved to dismiss the case without prejudice. However, the trial court dismissed the case with prejudice.

4. Appellate counsel for Respondent likewise was unaware of the Fayette Circuit Court's actions and filed several pleadings on Respondent's behalf with this Court, including a waiver of right to respond (May 17, 2010), an extension motion, motion to proceed in forma pauperis (August 24, 2010), and a brief in opposition to the Writ of *Certiorari* (August 24, 2010).

5. On September 28, 2010, this Court granted the Commonwealth's petition for a Writ of *Certiorari*.

6. On October 4, 2010, Respondent's counsel contacted the undersigned counsel and informed them that she would be filing a motion to dismiss the action in this

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[2]Undersigned counsel did not inform the local prosecutor that a Petition for Writ of *Certiorari* was being drafted.

Court because the Fayette Circuit Court had dismissed Respondent's case with prejudice on March 8, 2010.

7. Following counsel's conversation with Respondent's counsel, the undersigned filed a motion pursuant to Kentucky Civil Rule (CR) 60.02[3] in Fayette Circuit Court asking the trial court to rescind its March 8,

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[3]CR 60.02 is a procedural mechanism that provides relief from orders entered in the circuit court. It provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

2010, order.[4] The trial court declined to rescind the order, but did remove the "with prejudice" language from the March 8, 2010, order.

ARGUMENT

A. This Case Is Not Moot

It is well established that the dismissal of an indictment following an appellate court's reversal of a conviction does not moot the government's appeal of that appellate court ruling. The leading case is *United States v. Villamonte-Marquez*, 562 U.S. 579 (1983). In *Villamonte-Marquez*, a district court convicted two foreign nationals on drug smuggling charges. The Fifth Circuit invalidated the search that led to the incriminating evidence because it violated the Fourth Amendment. *Id.* at 583 - 84. "[S]ubsequent to the issuance of the mandate by the Court of Appeals vacating [the Respondent's] convictions, the

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[4]At the time Commonwealth filed the CR 60.02 motion in the Fayette Circuit Court, it was unsure of what effect the dismissal would have on the case before this Court. Since the Commonwealth's deadline for filing its merits brief in this Court was fast approaching, counsel determined that the CR 60.02 motion should be filed out of an abundance of caution. Counsel also had a duty to the Commonwealth of Kentucky to rescind the trial court's void judgment. Upon further research, however, counsel now knows that the trial court's dismissal does not affect the case before this Court. See *Villamonte-Marquez*, 562 U.S. at 581 n. 2.

indictments against them were dismissed." *Id.* at 581 n. 2. Therefore, the Respondents argued that their case before this Court was moot. *Ibid.* This Court "reject[ed] the contention." *Ibid.*

> The Government has sought review of the Court of Appeals' decision reversing respondents' convictions. Ordinarily our reversal of that decision would reinstate the judgment of conviction and the sentence entered by the District Court. See *United States v. Morrison*, 429 U.S. 1, 3, 97 S.Ct. 24, 25, 50 L.Ed.2d 1 (1976) (Per Curiam). The fact that the Government did not obtain a stay, thus permitting issuance of the mandate of the Court of Appeals, would not change the effect of our reversal. See *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467, 67 S.Ct. 798, 799, 91 L.Ed. 1024 (1947); *Carr v. Zaja*, 283 U.S. 52, 51 S.Ct. 360, 75 L.Ed. 836 (1931). Under our reasoning in *Mancusi v. Stubbs*, 408 U.S. 204, 205 207, 92 S.Ct. 2308, 2309 2310, 33 L.Ed.2d 293 (1972), the absence of an indictment does not require a contrary conclusion. Further, it is settled law that the preliminary steps in a criminal proceeding are "merged" into a sentence once the defendant is convicted and sentenced. See *Parr v. United States*, 351 U.S. 513, 518 519, 76 S.Ct. 912, 916, 100 L.Ed. 1377 (1956); *Berman v. United States*, 302 U.S. 211, 58 S.Ct. 164, 82 L.Ed. 204 (1937). Upon respondents' conviction and sentence, the indictment that was returned against them was merged into their

> convictions and sentences, thus obviating any need for a separate reinstatement of the original indictment.
>
> * * *
>
> At this juncture, for reasons explained above, the indictment was merged into the judgment, and a successful effort on the part of the Government to reverse the judgment of the Court of Appeals would have the effect of reinstating the judgment of conviction.

Ibid.

A similar result is warranted in this case. Like the government in *Villamonte-Marquez*, the Commonwealth failed to seek a stay of the Kentucky Supreme Court's decision reversing the trial court's denial of Respondent's motion to suppress. Such a stay was not necessary to preserve this Court's jurisdiction. R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 17.10, p. 770 (8th ed. 2002). Also, like *Villamonte-Marquez*, the indictment had been dismissed. Nevertheless, this Court retains jurisdiction because "the absence of an indictment d[oes] not render the case moot." *United States v. Perez*, 110 F.3d 265 (5th Cir. 1997), citing *Villamonte-Marquez*, 462 U.S., at 581 n. 2. See also *Carr v. Zaja*, 283 U.S. 52, 53 (1931) (where respondent argued that "the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court . . . [and] therefore the case is finished[,]" this Court disagreed and held that issuance of the mandate "does not defeat [this Court's] jurisdiction."); *Aetna Cas.*

Co. v. Flowers, 330 U.S. 464, 467 (1947) ("Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction."); *Louisville v. Nashville R.R. Co. v. Behlmar*, 169 U.S. 644, 648 (1989) ("When cases are brought here from the circuit courts of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below; but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court by appeal, writ of error, or *Certiorari*."); Stern, Gressman, & Shapiro, *supra*, § 17.10, at 770 ("Nor will the Court be prevented from reviewing and reversing the decision below if the lower court judgment is obeyed, unless the nature of the case is such that reversal by the Supreme Court could then have no effect.").

This rule makes eminent sense. A reversal by this Court of a lower court's opinion vacates that lower court's opinion and nullifies all that was done in reliance on that erroneous opinion. See *Villamonte-Marquez*, 462 U.S. at 581 n. 2 ("the indictment that was returned against [Respondent] merged into [his] conviction[] and sentence[], thus obviating any need for a separate reinstatement of the original indictment."); *Mancusi v. Stubbs*, 408 U.S. 204, 205 - 07 (1972) ("because petitioner did not seek a stay of the mandate of the Court of Appeals, but rather obeyed it" did not render the case moot) citing *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 33 U.S. 437, 442 (1948); *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). Cf. *United States v. Morrison*, 429

U.S. 1, 3 (1976) (per curiam) (Government entitled to appeal from a post-conviction pre-sentence "order suppressing the evidence, since success on that appeal would result in the reinstatement of the general finding of guilt, rather than in further factual proceedings relating to guilt or innocence."). Therefore, should this Court ultimately reverse the Kentucky Supreme Court on the merits of this case, the indictment and guilty plea would automatically be reinstated. Thus, the issues in this case are still "'live'" and both the Commonwealth and Respondent retain "'a legally cognizable interest in the outcome'" of the case. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (citations omitted).[5]

Respondent's contention (Motion, p. 5 - 7) that this case is moot and not ripe because "[n]o charges are pending" wholly misses the point. A reversal by this Court would simply reinstate the old indictment and guilty plea. *Villamonte-Marquez*, 462 U.S. at 581 n. 2.

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[5]It should be noted that correction of the trial court's void "dismissal with prejudice" language was unnecessary to facilitate this Court's review. Under *Villamonte-Marquez, supra*, any decision by this Court would necessarily remove any judgments based upon the Kentucky Supreme Court's opinion. Should this Court overturn the ruling of the Kentucky Supreme Court, the dismissal of the trial court, be it with or without prejudice, would be removed as based upon a void judgment, and the original guilty plea reinstated. It is of no matter then that the Respondent has appealed the Commonwealth's victory at the trial court to remove the "with prejudice" language from the trial court's dismissal. The case is currently a live case in controversy before this Court.

Moreover, if Respondent was correct on this point, it would follow that government appeals from trial court orders dismissing indictments would always be "moot" unless the judgment of dismissal was stayed pending appeal. Such an approach to appellate practice would undermine ordinary criminal appellate procedure, since stays have never been thought necessary to preserve the government's appeal rights.

Not surprisingly, therefore, lower courts have also held that appeals did not become moot in analogous situations. For example, in *United States v. Cefaratti*, 202 F.2d 13 (D.C. Cir. 1953), the defendant was indicted on four counts. *Id.* at 14. Cefaratti moved "to suppress the seized evidence on the ground that the search and seizure were illegal." *Ibid.* The trial court granted the motion to suppress. *Ibid.* "Since this left no substantial evidence in support of counts 3 and 4, appellee would necessarily have been acquitted on these counts if the government had gone to trial." *Ibid.* Therefore, "the government moved to dismiss counts 3 and 4, and they were dismissed." *Ibid.* Cefaratti was "tried and acquitted on counts 1 and 2." *Id.* at 14 n. 2. After this, the government appealed, "not from the order dismissing the indictment, but from the order suppressing the evidence." *Id.* at 14. "No indictment, therefore, was pending at the time of appeal. . ." *Nelson v. United States*, 208 F.2d 505, 517 n. 46 (D.C. 1954). The Court of Appeals held that the case was not moot because if the trial court's "order is reversed before the statute of limitations runs, the government plans to reindict appellee and try him." *Cefaratti*, 202 F.2d at 14.

More recently, in *In re I.J.*, 906 A.2d 249 (D.C. 2006), the trial court suppressed the challenged statement and "only moments later dismissed the charges against the appellee for want of prosecution. Without making any further filings in the Superior Court, the government filed a notice of appeal challenging the trial judge's suppression of appellee's statement to [the officer]." *Id.* at 253. The appellee challenged the government's appeal on "jurisdictional" grounds premised "on the notion that once the trial judge dismissed the charges, there was no 'charge pending' at the time appeal was taken. . ." *Ibid.* The D.C. Court of Appeals held that it allows "government appeals where the charges against the defendant have been dismissed, but there still exists the possibility of charges being brought anew should the suppressed evidence be held to be admissible on appeal." *Id.* at 254. See also *United States v. Hunter*, 692 A.2d 1370, 1374 n. 3 (D.C. 1997) (holding that even though the indictment had been dismissed "the government proposes to seek a new indictment, . . . and the case is not moot").[6]

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[6]Likewise, even if Respondent's guilty plea could not be reinstated upon a successful appeal to this Court, and even if the Commonwealth was barred from re-indicting the Respondent upon the original charges, contentions with which the Commonwealth disagrees, Respondent could still be indicted for possession of drug paraphernalia, second-offense, a felony at the time that he committed his offense, since digital scales were seized from the apartment and the Respondent was not originally charged with their possession. This is a charge that could lead to continued

B. This Case Presents No Double Jeopardy Concerns

Respondent claims (Motion, p. 6) that "further proceedings are barred by the Double Jeopardy Clause." Obviously no double jeopardy concerns are present in this case. The indictment was dismissed prior to trial and no jurors were sworn. *Crist v. Bretz*, 437 U.S. 28 (1978) (jeopardy attaches when the jury is empaneled and sworn). "Th[is] Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass v. United States*, 420 U.S. 377, 388 (1975) (internal quotations and citations omitted). The counts against Respondent were dismissed pretrial on grounds unrelated to the merits of the case, and before the question of the guilt or innocence of Respondent was before the trial court. *Serfass, supra.* Accordingly, jeopardy had not attached.

This is why Respondent's reliance on *United States v. Martin Linen Co.*, 430 U.S. 564 (1997) is misplaced. (Motion, p. 6). Respondent cites *Martin Linen Co.*, for the proposition that a ruling by a trial court that amounts to an acquittal attaches double jeopardy and bars retrial. (Motion, p. 6). However, *Martin* deals

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prosecution, arising from the same events and relying on the same evidence, as the current charges, and would necessarily require this Court's reversal of the Kentucky Supreme Court's ruling, suppressing the evidence in Respondent's case.

with trial court acquittals during trial, not pretrial. Respondent's case was dismissed prior to trial and as such double jeopardy has not attached. A case from this Court that is more on point than *Martin* is *United States v. Wilson*, 420 U.S. 332 (1975). In *Wilson* this Court stated,

> Similarly, it is well settled that an appellate court's order reversing a conviction is subject to further review even when the appellate court has ordered the indictment dismissed and the defendant discharged. *Forman v. United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4 L.Ed.2d 412, 419 (1960). If reversal by a court of appeals operated to deprive the Government of its right to seek further review, disposition in the court of appeals would be 'tantamount to a verdict of acquittal at the hands of the jury, not subject to review by motion for rehearing, appeal, or *Certiorari* in this Court.' *Ibid.* See also *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 243, 78 S.Ct. 245, 251, 2 L.Ed.2d 234, 240 (1957).
>
> It is difficult to see why the rule should be any different simply because the defendant has gotten a favorable postverdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling. Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety,

> a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. at 345. See also *United States v. Scott*, 437 U.S. 82 (1981) (government not precluded from appealing order dismissing two counts of the indictment where trial court at conclusion of evidence and on defendant's prior motion, dismissed two counts of a three-count indictment because of prejudice from preindictment delay and where jury returned not guilty verdict on third count). This Court in *Wilson* held that the Government may appeal from a post-verdict ruling favoring the defendant, even after the defendant had been found guilty, because a new trial would not result, only the reinstatement of the original verdict. This Court held that double jeopardy was not offended even under these circumstances. *Wilson* at 352-353. Similarly here, a new trial would not result. Should this Court overturn the decision of the Kentucky Supreme Court, Respondent's guilty plea would simply be reinstated.

That the trial court stated in dismissing the Respondents' case with prejudice, over the Commonwealth's objection, that the Commonwealth would have lacked sufficient proof to proceed to trial does not change that result. Kentucky trial courts lack the authority to grant summary judgment in criminal cases. Indeed, "prior to trial a [Kentucky] trial court cannot weigh the evidence to resolve whether the Commonwealth can or will meet its burden of proof." *Commonwealth v. Hay*, 987 S.W.2d 792, 794 - 95 (Ky.

App. 1998) (citing *Commonwealth v. Hayden*, 489 S.W.2d 513, 516 (Ky. 1972)). See also *Commonwealth v. Isham*, 98 S.W.3d 59, 61 - 62 (Ky. 2003); *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994) (holding that it was not the province of a trial judge to evaluate evidence in advance in order to decide whether a trial should be held).[7]

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[7]The same holds true in federal court. *United States v. Knox*, 396 U.S. 77, 83, 84 n. 7 (1969) (stating that evidentiary questions concerning whether the defendant established a duress defense or whether his false statement was made "willfully," as required by statute, should be determined initially at trial, and not on a motion to dismiss under Federal Rule of Criminal Procedure 12(b)(1)); *United States v. Sampson*, 371 U.S. 75, 78 - 79 (1962) (noting that at the pretrial stage, "none of these charges have been established by evidence, but at this stage of the proceedings the indictment must be tested by its sufficiency to charge an offense."); *United States v. DeLaurentis*, 230 F.3d 659, 661 (3rd Cir. 2000) ("Federal Rule of Criminal Procedure 12(b)(2) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges."); *United States v. Pope*, 613 F.3d 1255, 1259 -1260 (10th Cir. 2010) ("unlike their civil counterparts, criminal proceedings have no extensive discovery and summary judgment procedures requiring both sides to lay their evidentiary cards on the table before trial."); *United States v. Salman*, 378 F.3d 1266, 1267 -1268 (11th Cir. 2004) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of sufficiency of the evidence."), (quoting *United States v. Critzer*, 951 F.2d 306,

Nor does it matter, for double jeopardy purposes, that the trial court's initial order dismissed the case with prejudice. The Kentucky Supreme Court has held that a trial judge does not have the authority to dismiss a charge with prejudice unless it has the Commonwealth's consent. *Gibson v. Commonwealth*, 291 S.W.3d 686 (Ky. 2009). A dismissal with prejudice must be supported by substantive law or serious governmental misconduct related to the prosecution; otherwise, dismissal of a criminal charge by a court "is not within the province of the judicial branch of our government[.]" *Id.* at 691. See also *Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000) (where the Court of Appeals observed that a trial court may dismiss an indictment (without prejudice) if prosecutorial misconduct occurred during the grand jury proceedings. However, the Court held that it was an abuse of discretion for the dismissal to be with prejudice).

Thus, Respondent's double jeopardy claim lacks merit. The case was dismissed prior to trial. No double jeopardy concerns are manifested. Moreover, the trial court lacked any state Constitutional authority to dismiss the case with prejudice, and has since rectified its void dismissal. Therefore, the Commonwealth will not be barred "from prosecuting King in the event that it prevails" before this Court. (Motion, p. 6). Rather, the indictment and guilty plea

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307 (11th Cir. 1992) (per curiam)); *Salman*, 278 F.3d at 1269 n. 5 (noting that "[t]he Third, Eighth, and Ninth Circuits have reversed dismissals of indictments based on the insufficiency of the evidence.").

will simply be reinstated. *Villamonte-Marquez*, 462 U.S., at 581 n. 2. Respondent admits as much in footnote 2 when he points out that this Court held in *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1997), that double jeopardy concerns would not attach when restoration of the guilty verdict would be the outcome, as opposed to retrial; however, Respondent's contention that a new trial would result upon this Court's reversal of the Kentucky Supreme Court's opinion is without merit for the reasons discussed above. See *Villamonte-Marquez*, 462 U.S. at 581 n. 2; *Martin Linen*, 430 U.S. at 570 ("Thus a postverdict dismissal of an indictment after a jury rendered a guilty verdict has been held to be appealable by the United States because restoration of the guilty verdict, and not a new trial, would necessarily result if the Government prevailed.").

CONCLUSION

Under the rules expressed by this Court in *Villamonte-Marquez*, *supra*, and *Wilson*, *supra*, this case is not moot and no double jeopardy has attached. As such, Respondent's motion to dismiss this Court's grant of *certiorari* as improvidently granted must be denied. It is of no concern that Respondent's indictment was dismissed by the lower court, because his indictment is part of the case now before this Court. Double jeopardy has obviously not attached, and any ruling by this Court in the Commonwealth's favor will reverse the decision of the Kentucky Supreme Court, upon which the circuit court's dismissal is based, and reinstate the Respondent's original indictment and guilty plea. This case is currently a ripe controversy primed for this Court's review.

Wherefore, Respondent's motion to dismiss should be denied.

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REPLY BRIEF

No. 09-1272

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In The
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HOLLIS DESHAUN KING,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

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Lawful police action cannot impermissibly create exigent circumstances. Under a lawfulness test, a reviewing court determines whether, prior to the exigency, the police violated the Fourth Amendment by, for example, unlawfully entering a home or coercing an occupant to permit police entry. When, as occurred here, police have not been granted consent, but behave lawfully at all times leading up to the existence of an exigency, police cannot impermissibly create the exigency upon which they rely for warrantless entry. Contrary to Respondent's contention, that is precisely what occurred in this case. For those reasons, the Kentucky Supreme Court's decision must be reversed. Its test – which looks to whether the exigency was foreseeable or to the officer's subjective motivations – disturbs the balance this Court has created between the privacy interests granted by the Fourth Amendment and the need for law enforcement to effectively carry out their duties. It is unworkable, rewards illegal actions, and conflicts with bedrock Fourth Amendment principles.

Respondent devotes much of his brief to his contention that no exigency existed here. This Court did not grant *certiorari* to review that issue, and does not typically decide issues not decided by the court below. However, if this Court chooses to address the issue, there is ample evidence supporting the conclusion of the Fayette County Circuit Court and Kentucky Court of Appeals that exigent circumstances existed in this case.

I. POLICE DO NOT IMPERMISSIBLY CREATE EXIGENT CIRCUMSTANCES WHEN THEY ACT LAWFULLY AT ALL TIMES

A. A Simple Lawfulness Test Properly Balances Fourth Amendment Privacy Concerns and Public Safety Concerns

Police officers do not impermissibly create exigent circumstances when they behave lawfully prior to the existence of the exigency. As discussed in the Commonwealth's opening brief on the merits, as well as in the Solicitor General's amicus brief in support of the petitioner, there can be no suppression of lawfully obtained evidence without a clear showing of prior unlawful behavior by police. Comm. Br. at 12-13, 34-36; U.S. Br. at 6, 11-13.

A reviewing court employing a lawfulness test to determine whether police have impermissibly created an exigency, first must determine whether an exigency and probable cause exist. Once it does so, the reviewing court looks to the lawfulness of the officer's prior actions to determine whether they behaved in a prohibited manner that would necessitate the suppression of evidence seized during a warrantless search under the exclusionary rule. See *Herring v. United States,* 555 U.S. 135, 129 S.Ct. 695, 702 (2009). For example, the reviewing court might find that, prior to the exigency arising, the officers unlawfully seized a residence's occupant, coerced the occupant to consent to their entry, or unlawfully entered the residence and began searching it. If the officers did none of those things, they did not impermissibly

"create" the exigency. Lawful police action cannot impermissibly create exigent circumstances and is necessarily reasonable under the Fourth Amendment.

Therefore, the proper test for determining when police "impermissibly" create exigent circumstances is the simple, one-step inquiry adopted by the Second Circuit: did the police act in a lawful manner? *United States v. MacDonald*, 916 F.2d 766, 772 (2nd Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991). This test properly balances the competing needs of the privacy interests at stake with the needs of law enforcement while remaining within the confines of well-established Fourth Amendment analysis. This simple question of whether police acted lawfully provides a clear and precise guidepost for officers and courts alike when determining whether police impermissibly created exigent circumstances.

Respondent agrees with the Commonwealth on this point and makes no attempt to defend the test set forth by the Kentucky Supreme Court. The test proposed by Respondent is that "police impermissibly create exigent circumstances when, as here, they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Resp. Br. at 23-24. He explains that officers "may not rely on the fruits of coercive conduct in order to justify their decision to forego a warrant." *Id.* at 23. Respondent's test amounts to nothing more than a lawfulness test.

Failing to acknowledge that he sets forth the same lawfulness test as the Commonwealth, Respondent contends that the Commonwealth would have this Court adopt a test that "contains no identifiable limit on police activity and [that] stretches the exigent circumstances exception too far." *Id.* at 26. That claim wholly misses the point of a lawfulness test. Contrary to Respondent's contentions that a lawfulness test "preclude[s] any real review" of police action, the Commonwealth's proposed test *invites* review beyond a determination that exigent circumstances existed, and therefore warrantless entry was reasonable. *Id.*[1] A lawfulness test requires that none of the officers' actions prior to the existence of exigent circumstances were unlawful in a manner that would

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[1] Respondent's argument on pages 26 and 27 of his Brief in Opposition that a lawfulness test allows for a finding that exigent circumstances exist in all cases where officers hear "people moving around in response to their knocking," again wholly misses the point of a lawfulness test. As will be discussed, *infra*, the question before this Court is not whether exigent circumstances existed. The question before this Court is whether lawful police action can impermissibly create exigent circumstances and what test is proper for determining when that has occurred. A lawfulness test has no bearing on whether exigent circumstances exist that allow for a reasonable warrantless entry under the Fourth Amendment. This test only controls the reviewing court's determination regarding suppression of seized evidence after a reasonable warrantless entry based upon exigent circumstances and probable cause has occurred. This does not represent a "blanket rule" or an attempt to implicitly overrule *Richards v. Wisconsin*, 520 U.S. 385, 392 (1997). On the contrary, the Kentucky Supreme Court's foreseeability test attempts to render *Richards* unworkable. See U.S. Br. at 22.

necessitate suppression. And as Respondent admits, this is the usual and ordinary course of review for any challenged police action. *Id.* at 25; see, *e.g.*, *Williams v. United States*, 401 U.S. 646, 662 (1971); *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Thus, a lawfulness test properly allows a reviewing court to make determinations about police action that occurred prior to the existence of exigent circumstances based upon the lawfulness of those actions.

Respondent again misses the Commonwealth's point when he contends that the Commonwealth "would have this Court hold that the police may bang as loudly as possible on a person's door, at night, and *demand* entry, as long as the individual officer believed that his actions were 'lawful'." Resp. Br. at 30 (emphasis added). The Commonwealth does not contend that warrantless entry is lawful, merely because the officer believes it is. This would be an absurd result, invalidating all Fourth Amendment protections granted by the constitution. On the contrary, the test set forth by the Commonwealth calls for a reviewing *court* to make that lawfulness determination based upon well-established tests for coercion and seizure.

Respondent sets forth a lawfulness test as the proper test for a reviewing court to employ to determine when police action can impermissibly create exigent circumstances. As the Commonwealth has

repeatedly asserted, under such a test, lawful police action cannot impermissibly create exigent circumstances.

B. The Commonwealth Would Prevail Under a Lawfulness Test

The Commonwealth prevails under a lawfulness test. Given that there was no unlawful seizure, coercion, or otherwise unlawful police action prior to the existence of exigent circumstances and probable cause, the police in this case did not impermissibly create the exigent circumstances permitting their warrantless entry.

The officers had only a single interaction with Respondent prior to the existence of exigent circumstances, a knock and announce on his door. There is nothing unlawful about an officer knocking on a citizen's door, announcing his presence, and attempting to engage him in a consensual encounter. Since the officers' actions in knocking on Respondent's door and announcing their presence were lawful under the Fourth Amendment, the next step in a lawfulness analysis is whether, regardless of the facial lawfulness of police action, there exists an unlawful seizure or coercion.

Respondent's contention that he was unlawfully seized by the officers' knock and announce at his door is without support. Resp. Br. at 22-26. There is no evidence to indicate that the Respondent was unlawfully seized by officers who were standing *outside* his

apartment. There was no threatening police presence, display of weapons, physical touching, or use of language or tone of voice indicating that compliance with the officers' request might be compelled in this case. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Mendenhall*, 446 U.S. at 554. This Court has clarified that for a "seizure" to have occurred, either the person must be physically subdued by a police officer or the person must submit to the officer's show of authority. See *California v. Hodari D.*, 499 U.S. 621, 626 (1991). Neither occurred in this case. In fact, the officers made no show of authority at Respondent's door. Even had the officers made a show of authority and demanded that Respondent allow them entry as he contends occurred, Respondent never submitted to that show of authority. Rather, he ignored the officers' authority and chose to respond illegally. No unlawful seizure occurred here.

Nor could it plausibly be argued that the officers entered Respondent's apartment based on coerced consent. When a person is not seized or in custody, his consent is voluntary so long as it was not the result of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Contrary to Respondent's contentions, the officers here did not unlawfully "demand entry." The officers only knocked and announced their presence at Respondent's door. Even if Respondent's allegations of a "demand for entry" ring true, no consent for entry was given here. Respondent ignored the officers' attempts at a consensual encounter and chose to

pursue an unlawful action. Since there was no consent, the officers' actions at the Respondent's door cannot be determined to have been coercive. It would be a dangerous rule to determine that when officers lawfully attempt to gain consent, a reasonable person could be deemed coerced or seized because they choose to commit an unlawful act rather than consent. See, *e.g.*, *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

Since there was no unlawful entry and the officers did not unlawfully seize or coerce the Respondent into giving his consent for entry, the officers' lawful and reasonable actions in knocking and announcing their presence at Respondent's door, did not impermissibly create the exigency of destruction of evidence. In contending otherwise, Respondent mischaracterizes the underlying facts of this case in numerous ways. Resp. Br. at i, 1, 6, 12, 13, 17, 18, 23, 24, 30.

First, Respondent repeatedly asserts that the officers in this case demanded entry into his home. Resp. Br. at i, 1, 6, 12, 13, 17, 18, 23, 24, 30. He cites to a single sentence from the Circuit Court opinion, which used the phrase "knock and demand," for this assertion. See Pet. App. at 3a-4a. The body of the Circuit Court's opinion, however, fully supports that what occurred here was a knock and announce. The court's incidental use of the phrase "knock and demand" was merely a case of imprecision. If this were not the case the Circuit Court could not have found, as a matter of fact, and concluded as a matter

of law, that the officers properly continued their investigation "by initially knocking on the door of the apartment unit and awaiting the response or consensual entry." *Id.* at 9a. Entry demanded is not consensual.

Moreover, in their discussion of the facts of this case, as well as their application of the applicable law to those facts, both the Kentucky Court of Appeals (in the majority opinion as well as the dissent) and the Kentucky Supreme Court defined the officers' knock on Respondent's door as a "knock and announce," not a "knock and demand for entry." *Id.* at 14a, 19a, 25a, 27a, 36a, 43a, 46a, 47a. The Kentucky Supreme Court's finding that the officers did not act in bad faith in knocking on Respondent's door and announcing their presence also supports the conclusion that the Circuit Court did not intend to find that the officers "demanded entry." Testimony at the suppression hearing never raised the issue or premise that the officers demanded entry into Respondent's apartment, nor does the record present any evidence that the officers ever demanded entry into Respondent's apartment. See J.A. 22-23, 32, 41, 46. In fact, an officer testified at the suppression hearing that all that was said at Respondent's door was, "Police, police, police!" or "This is the police!" *Id.* at 21-24.

Given that both the Kentucky Court of Appeals and the Kentucky Supreme Court read the Circuit Court's use of the phrase "knock and demand" to be an imprecise statement of the facts in this case, and given that what actually occurred was a knock and

announce, this court should defer to that finding under the "two-court" rule. See *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors of fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949))). As such, the finding here is that the officers knocked and announced their presence. There was no demand for entry or coercion.

Second, Respondent alleges that the officers in this case affected a warrantless entry "to prevent the destruction of evidence relating to a completed, nonviolent, misdemeanor offense." Resp. Br. at 28; See also Resp. Br. at 1, 8-10. Respondent's allegations ignore all of the surrounding circumstances leading up to the officers' knock and announce at his door. Respondent would have this Court ignore the officer's testimony at the suppression hearing where he clearly indicated that he believed that he was in hot pursuit of a fleeing felon – a crack cocaine dealer – and that the felon had entered Respondent's apartment. J.A. 21-24, 31-32, 38-40, 46-47, 54-57, 65-66. Respondent would also have this Court ignore the officer's testimony that he believed that the fleeing felon was aware of the police presence and was destroying crack cocaine, as well as marijuana. *Id.* at 24-25, 45-47. And Respondent would have this Court ignore the officer's testimony that immediately upon

entry into Respondent's apartment the police conducted a protective sweep of the premises in an attempt to locate the fleeing felon. *Id.* at 24-28, 63-65. All told, the officer's uncontroverted testimony amply supports the conclusion that the officers entered Respondent's apartment in an effort to prevent the destruction of evidence relating to the felony offense of trafficking in cocaine.

Respondent's reliance on *Welsh v. Wisconsin*, 466 U.S. 740 (1984), to support his argument that warrantless entry was not justified in this case is therefore misplaced. Resp. Br. at 28. This Court held that the officer's warrantless entry into the home in *Welsh* was not justified because the underlying offense was a civil, rather than criminal, offense with no imprisonment. *Welsh*, 466 U.S. at 754-755. Here, police officers were chasing a drug trafficker. Trafficking in cocaine is a felony in Kentucky. KRS 218A.1412. The police believed that the felony drug trafficker entered the Respondent's apartment. Therefore, there were much graver offenses to support warrantless entry than simply smoking marijuana as Respondent contends. Indeed, Respondent himself pled guilty to first-degree trafficking in a controlled substance, a Class C Felony in Kentucky. KRS 218A.1412. However, even if the officers believed that only marijuana consumption was taking place in Respondent's apartment, they would still have been entitled to enter the apartment upon hearing sounds indicating the destruction of the drug. Drug use is a far more serious offense than the traffic violation at issue in *Welsh*.

Respondent also cites to *Mincey v. Arizona*, 437 U.S. 385 (1978) and *United States v. Jeffers*, 342 U.S. 48 (1951) for the proposition that officers cannot claim an exigency if they could have guarded the door to prevent the destruction or removal of evidence. Resp. Br. at 28-29. This is inapplicable here. The officers here heard the destruction of evidence actually taking place after they knocked, whereas the evidence wasn't in the process of destruction in *Mincey* or *Jeffers*. See *Mincey*, 437 U.S. at 383; *Jeffers*, 342 U.S. at 52. Officers here did not have the opportunity to prevent the destruction of evidence by simply guarding the Respondent's door. The suspect was inside his apartment, unlike in *Mincey* and *Jeffers*, and the destruction had already begun.

Respondent's allegations of unlawful police action must come to naught. Under a lawfulness test, since there was no unlawful seizure or coercion in this case the officers' lawful actions in knocking on Respondent's door and announcing their presence did not impermissibly create the exigency of destruction of evidence. Once the exigency existed, coupled with probable cause, the officers' warrantless entry was reasonable under the Fourth Amendment. Therefore the Kentucky Supreme Court improperly suppressed the evidence seized during the warrantless search.

II. EXIGENT CIRCUMSTANCES EXISTED IN THIS CASE

A. This Court May Assume That Exigent Circumstances Existed In Order To Determine If The Police Impermissibly Created Them

In its opinion, the Kentucky Supreme Court never determined whether exigent circumstances existed. Rather, it "assume[d] for the purpose of argument that exigent circumstances existed, and proceed[ed] to the more important question of whether police created their own exigency." Pet. App. at 43a; *King v. Commonwealth*, 302 S.W.3d 649, 655 (Ky. 2010). Without any citation to authority whatsoever, Respondent claims that this Court may not make the same assumption.[2] Resp. Br. at 21. Indeed, Respondent spends a considerable portion of his brief arguing that exigent circumstances did not exist in the present case. That issue is not before this Court.

This Court did not grant *certiorari* to decide whether exigent circumstances existed. And as this Court has often noted, "[o]rdinarily, 'we do not decide in the first instance issues not decided below,'" *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S.Ct. 788, 798 (2009) (quoting *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999)). Therefore, this Court need not address the existence

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[2] Respondent does not give citation to any authority for this proposition.

of exigent circumstances, as the Kentucky Supreme Court did not directly do so below.

However, this Court can assume conclusions assumed by the lower courts. For instance, in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), "[t]he state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest." *Id.* at 743 n.1. The Wisconsin Court of Appeals reversed and remanded for a hearing on the issue of consent, but that decision was reversed by the Wisconsin Supreme Court, which reinstated the trial court's decision. *Ibid.* Therefore, for purposes of its decision, this Court "assume[d] that there was no valid consent to enter the petitioner's home." *Ibid.*[3] Thus, Respondent's bald assertion is completely indefensible. This Court may therefore make the same assumption that the Kentucky Supreme Court made – that exigent

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[3] See also, *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 64 (2007) (Court assumed "for argument's sake" applicability of a statute, but cautioned "we repeat that we do not decide this question"); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (assessing proposed exception to knock and announce rule in case where the Wisconsin Supreme Court "[a]ssum[ed]" the police "did not knock and announce prior to their entry"); *United States v. Place*, 462 U.S. 696, 700 (1983) (assessing whether officer's search of personal luggage was valid under *Terry* in case where the court of appeals "assumed both that *Terry* principles could be applied . . . and that reasonable suspicion existed to justify the investigatory stop of Place").

circumstances exist in the present case – in order to reach the more important question of whether the police can impermissibly create their own exigency.

B. Exigent Circumstances Existed In This Case

Even if this Court were to address whether exigent circumstances existed in this case, it would find that they did. To determine whether exigent circumstances existed to permit a warrantless entry, the officers must have had a reasonable belief that evidence was or may be destroyed or removed before they could lawfully seize the evidence.[4] In order to determine if the officers' belief that evidence was being destroyed within the Respondent's apartment was reasonable, this Court looks at the totality of the circumstances. See *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548-549 (2009) (analyzing the totality of the circumstances to determine if exigent circumstances existed).

Respondent contends that *Johnson v. United States*, 333 U.S. 10 (1948) controls the outcome of this case. Resp. Br. at 11, 13-18. That case is easily

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[4] The threshold standard for exigent circumstances is less than probable cause. For example, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that in order to conduct a no-knock entry during the execution of a search warrant, "the police must have a reasonable suspicion that knocking and announcing their presence" may result in "the destruction of evidence." *Id.* at 394.

distinguishable. *Johnson* was not an exigent circumstances case. In *Johnson*, when a police officer knocked on a hotel room door after smelling burning opium, the occupant did not attempt to flee or destroy evidence. See *Johnson*, 333 U.S. at 15 (noting that "[n]o suspect was fleeing or likely to take flight . . . [and] [n]o evidence or contraband was threatened with destruction or removal"). Instead, after a "slight delay," the occupant answered the door. *Id.* at 12. The problem with the search that followed was that the occupant's consent was not freely given. This Court concluded that police entry into the hotel room was "demanded under color of office," and that the occupant gave her consent "in submission to authority, rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13.

The circumstances here are altogether different. Here, after the police officers knocked on the door and announced their presence, the officers heard things inside the apartment being moved around. Based upon their training and experience, the officers recognized the sounds coming from the apartment to be consistent with the sounds of destruction of physical evidence. J.A. at 23-25, 40-43. Believing that they were in hot pursuit of a fleeing felon, that the felon had recently entered the left apartment, and that the felon was now destroying physical evidence of his crime of trafficking, the police officers entered the apartment. *Id.* at 24-25, 45-47. One of the officers specifically testified that due to the nature of crack

cocaine it can easily be destroyed, and he believed that it was being destroyed. *Id.* at 24.

Examining the totality of the circumstances it would be a reasonable belief that evidence was being destroyed within Respondent's apartment. It would be reasonable for the officers to believe that the fleeing felony crack cocaine trafficker had entered Respondent's apartment, given that he could have only entered one of two apartments and the strong scent of burning or burnt marijuana was emanating from Respondent's doorway; as if it was the door that had recently been quickly opened and slammed shut by the fleeing felon, allowing the scent of marijuana to escape and be blown down the apartment breezeway. In fact, this Court stated in *Johnson v. United States*, 333 U.S. 10 (1948), that the odor of drug use "might very well be found to be evidence of most persuasive character." It would be reasonable for the officers to believe that, based upon their training and experience, the noises of movement they heard from the opposite side of Respondent's door, without any other response, were consistent with the destruction of evidence, given that they reasonably believed that the fleeing felony crack cocaine trafficker had recently entered the apartment and that crack cocaine is by its nature easily destroyed.[5] This new circumstance

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[5] Courts routinely acknowledge the ease with which drugs may be destroyed. See, *e.g.*, *United States v. Banks*, 540 U.S. 31, 40 (2003) (stating that "a prudent dealer will keep [his cocaine] near a commode or kitchen sink" in order "to get rid of it");

(Continued on following page)

solidified that belief. The officers' belief that exigent circumstances existed was eminently reasonable considering the totality of the surrounding circumstances. When coupled with the probable cause that a crime had been committed based upon the smell of marijuana, the officers' warrantless entry was reasonable under the Fourth Amendment.

United States v. Garcia, 983 F.2d 1160, 1168 (1st Cir. 1993) (noting that cocaine could be "easily and quickly hidden or destroyed"); *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991); *United States v. Nichols*, 344 F.3d 793, 798 (8th Cir. 2003) (same); *United States v. Dickerson*, 195 F.3d 1183, 1185-1187 (10th Cir. 1999) (recognizing that crack cocaine is easily disposed of "in the quantity alleged to have been distributed"). But see *United States v. Bates*, 84 F.3d 790, 796 (6th Cir. 1996) (exigent circumstances based on destruction of evidence not present because "it is unreasonable to think that fifteen kilograms of powdered cocaine could be quickly disposed of by flushing it down the toilet or dumping it down the sink drain.").

CONCLUSION

For the foregoing reasons, and those stated in the Petitioner's opening brief, the judgment of the Kentucky Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-1272

In the Supreme Court of the United States

COMMONWEALTH OF KENTUCKY, PETITIONER

v.

HOLLIS DESHAUN KING

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether police officers violate the Fourth Amendment by entering a residence with probable cause but without a warrant, based on a reasonable belief that evidence inside the residence is being destroyed, if it was reasonably foreseeable to the officers that persons inside the residence might destroy evidence in response to the officers' prior lawful conduct of knocking on the door and announcing their presence.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether police officers violate the Fourth Amendment by entering a residence with probable cause but without a warrant, based on a reasonable belief that evidence inside the residence is being destroyed, if it was reasonably foreseeable to the officers that persons inside the residence might destroy evidence in response to the officers' prior lawful conduct of knocking on the door and announcing their presence. The Court's analysis and resolution of that question will affect the conduct of federal law enforcement officers and the admissibility of evidence offered in federal criminal prosecutions. Accordingly, the United States has an interest in the proper resolution of the question presented.

STATEMENT

Following a conditional guilty plea in the Fayette Circuit Court, respondent was convicted of drug trafficking and related offenses under Kentucky law. Pet. App. 37a. He was sentenced to 11 years in prison. *Ibid.* The Kentucky Court of Appeals affirmed the circuit court's denial of respondent's motion to suppress evidence seized during a warrantless search of the apartment where respondent was staying. *Id.* at 13a-14a. The Kentucky Supreme Court reversed, concluding that the evidence seized during the search was obtained in violation of the Fourth Amendment. *Id.* at 34a-50a.

1. Evidence introduced during a suppression hearing showed that, after an undercover informant purchased crack cocaine from a drug trafficker, a detective monitoring the transaction saw the seller running into the breezeway of a nearby apartment building. Pet. App. 2a-3a, 35a; J.A. 20. The detective communicated this information and a description of the suspect to uniformed officers by radio. The uniformed officers arrived at the location and, at the detective's instruction, began to move toward the apartment building to arrest the suspect. Pet. App. 3a. The uniformed officers were already outside of their vehicle when the detective said over the radio that the suspect had entered the apartment at the back of the breezeway, on the right side. *Ibid.*, J.A. 42-44. The uniformed officers therefore did not hear that information. Pet. App. 3a, 5a; J.A. 43-44. The officers heard a door shut in the back of the breezeway, but they were uncertain whether the suspect had entered the apartment on the right or the left. J.A. 21-23, 41-45; Pet. App. 3a. The officers then smelled a strong odor of marijuana emanating from the door on the left, and they concluded that the left door had re-

cently been opened. J.A. 22-23; Pet. App. 14a. One of the officers then knocked on the door and announced, "This is the police." J.A. 23.

Although no one responded, the officers heard movement from within the apartment indicating to them, based on their past experience of hearing similar sounds, that the occupants were in the process of destroying evidence. J.A. 24, 42; Pet. App. 4a, 6a, 9a. The officers then kicked open the door, entered the apartment, and conducted a protective sweep in an unsuccessful attempt to locate the suspect. J.A. 25, 26; Pet. App. 4a. The officers did, however, find three individuals in the apartment, one of whom was smoking a marijuana cigarette. J.A. 25; Pet. App. 4a. The police also saw marijuana and powder cocaine on the coffee table and the kitchen counter, in plain view. J.A. 25-27; Pet. App. 4a. The officers placed the occupants of the apartment under arrest, including respondent. J.A. 27; Pet. App. 4a.

2. Before his trial for drug trafficking and related offenses, respondent moved to suppress the evidence seized during the search of the apartment as the fruit of an unlawful warrantless entry. The trial court denied the motion. Pet. App. 10a. The court reasoned that the odor of marijuana emanating from the apartment provided the officers with probable cause to believe that unlawful activity was occurring inside. The continued investigation, which included "knocking on the door of the apartment unit and awaiting the response or consensual entry," triggered movement that the officers "reasonably concluded" was the result of efforts to destroy evidence. *Id.* at 9a. In the court's view, this constituted exigent circumstances justifying a warrantless entry into the apartment. *Ibid.* After the trial court denied

the motion to suppress, respondent entered a conditional guilty plea to drug trafficking and related offenses, reserving the right to appeal the denial of his suppression motion. *Id.* at 13a, 16a.

3. The Kentucky Court of Appeals affirmed. Pet. App. 12a-33a. The court disagreed with the trial court's conclusion that the odor of marijuana permitted the officers to knock on the apartment door and, when they received no response but heard movement inside, to enter without a warrant. *Id.* at 20a. The court concluded, however, that in the circumstances of this case, the officers' conduct did not impermissibly create the exigent circumstances, reasoning that "the police did not engage in deliberate and intentional conduct to evade the warrant requirement." *Id.* at 21a.

The court stated that "[t]he correct standard [for a warrantless entry] is whether or not the officers reached a reasonable conclusion [to enter the apartment] based on the facts known to them at the time of the forced entry." Pet. App. 23a. Because the police were pursuing a suspected felony crack cocaine dealer to a particular apartment building and believed that he was about to destroy evidence of a serious crime, the warrantless entry into the apartment was valid. *Id.* at 24a.

Judge Buckingham dissented. In his view, the correct test for determining whether the police impermissibly create an exigency is whether it was foreseeable to the police that their investigative tactics would create the exigent circumstances that formed the justification for the warrantless entry. Pet. App. 26a. Judge Buckingham concluded that the officers created the exigent circumstances—fear of the destruction of evidence—by knocking on the apartment door and announcing their presence. *Id.* at 27a.

4. The Supreme Court of Kentucky reversed. Pet. App. 34a-50a. The court stated that there was "some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed." *Id.* at 43a. The court, however, "assume[d] for the purpose of argument that exigent circumstances existed." *Ibid.* The court then announced a two-part test to determine whether police action impermissibly creates the exigent circumstances used to justify a warrantless search. First, a reviewing court must determine whether the police deliberately created the exigency to avoid application of the warrant requirement. *Id.* at 45a-46a. Second, even if the officers did not act in bad faith, the reviewing court must invalidate the search if it "was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify [the] warrantless entry." *Id.* at 46a (quoting *Mann* v. *State*, 161 S.W.3d 826, 834 (Ark. 2004)).

Applying that standard, the court concluded that, although the officers in this case did not act in bad faith, it was reasonably foreseeable that knocking on the door and announcing "police" would prompt individuals inside the apartment to destroy evidence. Pet. App. 46a. The court stated that "[b]efore police announced their presence, there would have been no reason to destroy evidence of either the marijuana which the officers had smelled, or evidence of the original drug transaction." *Ibid.* The court further explained that if a suspect becomes aware of police presence while "police are observing a suspect from a lawful vantage point," and the suspect proceeds to destroy evidence, "then the exigency is generally not police-created." *Id.* at 47a. The problem in this case, the court explained, was that the officers

"unnecessarily announce[d] their presence," thereby creating the probability that evidence would be destroyed. *Ibid.*

SUMMARY OF ARGUMENT

A well-settled exception to the Fourth Amendment's warrant requirement allows police to conduct warrantless searches based on probable cause if exigent circumstances require immediate action. A warrantless search conducted pursuant to that exception is reasonable if the exigency arises in the course of a lawful police investigation, without regard to whether the exigency was foreseeable.

A. 1. Where police have acted unlawfully, they may be foreclosed from reliance on exceptions to the Fourth Amendment's warrant requirement, such as those for seizure of incriminating items in plain view, or searches conducted pursuant to consent, as well as for seizure of abandoned items. But where the police have acted lawfully, their prior conduct provides no obstacle to reliance on such exceptions. Warrantless searches conducted pursuant to the exigent circumstances exception should be analyzed in the same way. Because seeking voluntary cooperation or consent is lawful, the Fourth Amendment does not prohibit police from reasonably reacting to an exigency that arises when they knock on the door of a home to seek voluntary cooperation or consensual entry.

2. This Court has never required police officers to abstain from lawful investigatory conduct or obtain a warrant when it is foreseeable that a suspect will react illegally to a lawful request for voluntary cooperation or consent. To the contrary, this Court has rejected a foreseeability standard in the "plain view" context, and it has allowed warrantless searches pursuant to an exi-

gency that arises during the "hot pursuit" of a criminal suspect, even though the exigency was foreseeable when police attempted to make the warrantless arrest. This Court has also specifically stated that even after police officers gather sufficient evidence of criminal activity amounting to probable cause, they may continue to investigate crime and are not required to secure a warrant immediately. Police officers should be free to conduct their investigations as they deem appropriate, as long as their conduct is lawful.

3. The Court does not need to decide whether an exigent circumstances search could be rendered unlawful by a police officer's subjective desire to circumvent the warrant requirement. The courts below found no suggestion that the officers in this case acted in bad faith, and respondent did not argue in the courts below that the officers acted in bad faith. In any event, this Court has repeatedly stated that police officers' subjective motivations are irrelevant to the constitutional reasonableness of their actions.

B. 1. a. Permitting exigent circumstances searches based on probable cause as long as police officers' prior conduct was lawful adequately balances the privacy interests at stake with the need to provide clear guidance to police officers in the field and the need to avoid undue interference with appropriate police investigative activity. This Court has emphasized the importance of keeping the Fourth Amendment's requirements "clear and simple." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). A test based on whether police officers' conduct was lawful under well-understood Fourth Amendment standards is easy for police officers to apply.

b. A foreseeability test, however, would be difficult to apply in the field. In the present context, such a test

would require police to determine before knocking on a suspect's door whether it is reasonably foreseeable that the occupants of that particular residence would respond to the knock by engaging in the criminal act of destroying evidence. The concept of reasonable foreseeability has no place in current Fourth Amendment law, and a foreseeability test would thus require officers, often in rapidly developing situations, to make difficult case-specific judgments using an unfamiliar standard.

c. A foreseeability test also has unacceptable consequences. It rewards people who destroy evidence in response to lawful police requests for voluntary cooperation or consent; it perversely provides more Fourth Amendment protection to persons as to whom the police have greater suspicion of criminal wrongdoing; and it deters police from engaging in lawful police work for fear that a reviewing court will exclude evidence obtained during the investigation, based on the conclusion that the officer should have foreseen any exigency that arose.

2. These detrimental effects on law enforcement are unjustified. Warrantless searches conducted pursuant to the exigent circumstances exception still must be supported by probable cause. Moreover, police officers face significant disincentives to relying on investigative strategies that call for police-created exigency, because police officers will be reluctant to risk the success of their investigations on the prediction that the suspect will react to their request for voluntary cooperation by destroying evidence.

C. Application of the test described above requires the judgment of the Supreme Court of Kentucky to be reversed. The officers in this case knocked on the door of an apartment, announced themselves, and awaited a

response. Those actions were lawful, and the Supreme Court of Kentucky erred in holding that the police were foreclosed from responding to any ensuing exigency because that exigency was reasonably foreseeable to the police.

ARGUMENT

A WARRANTLESS SEARCH CONDUCTED PURSUANT TO THE EXIGENT CIRCUMSTANCES EXCEPTION IS REASONABLE IF THE EXIGENCY ARISES IN THE COURSE OF LAWFUL POLICE CONDUCT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Payton* v. *New York*, 445 U.S 573, 576 (1980), protects "persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The Amendment's "essential purpose * * * is to impose a standard of 'reasonableness' upon the exercise of discretion" by law enforcement "in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (footnote and citation omitted). The "touchstone" of the Fourth Amendment inquiry is "the reasonableness in all the circumstances" of the law enforcement practice at issue. *Maryland* v. *Wilson*, 519 U.S. 408, 411 (1997) (citation omitted).

The Fourth Amendment embodies a strong preference for warrants before entry into or search of a home. See, *e.g.*, *Kirk* v. *Louisiana*, 536 U.S. 635, 636, 638 (2002) (per curiam). The Court has long recognized, however, that in some circumstances "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively rea-

sonable." *Mincey* v. *Arizona*, 437 U.S. 385, 393-394 (1978); see also *Michigan* v. *Fisher*, 130 S. Ct. 546, 548 (2009); *Brigham City* v. *Stuart*, 547 U.S. 398, 400 (2006). The existence of exigent circumstances excuses only the necessity of obtaining a warrant; police must still have probable cause to conduct a search or arrest. See, *e.g.*, *Kirk*, 536 U.S. at 638 ("[P]olice officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."); *Steagald* v. *United States*, 451 U.S. 204, 213 (1981) (same).

It is well established that police may conduct warrantless searches under the exigent circumstances exception to prevent the destruction of evidence. *Brigham City*, 547 U.S. at 403; *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-478 (1971); *Ker* v. *California*, 374 U.S. 23, 40 (1963) (plurality opinion). Thus, if a police officer who has probable cause to search a home for evidence of a crime reasonably concludes that the occupants of the home are destroying evidence, the officer may enter the home without a warrant in order to prevent that destruction. See, *e.g.*, *United States* v. *Etchin*, 614 F.3d 726, 733-734 (7th Cir. 2010); *United States* v. *Martin*, 613 F.3d 1295, 1299 (10th Cir. 2010); *United States* v. *Samboy*, 433 F.3d 154, 158 (1st Cir. 2005), cert. denied, 547 U.S. 1118 (2006); *United States* v. *Rubin*, 474 F.2d 262, 268 (3d Cir.), cert. denied, 414 U.S. 833 (1973); cf. *Brigham City*, 547 U.S. at 400 (holding that police may enter home without warrant "when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

The Supreme Court of Kentucky held that police may not rely on the exigent circumstances exception to the Fourth Amendment's warrant requirement if they sub-

jectively intend to create an exigency, or if their lawful investigative decisions could foreseeably result in an exigency. Pet. App. 45a-46a. That holding cannot be reconciled with this Court's Fourth Amendment cases. Rather, police may conduct a warrantless search based on exigent circumstances as long as the investigative steps that preceded the exigency were lawful. A lawfulness test is firmly grounded in Fourth Amendment law, and reflects a proper balance between the needs of law enforcement and the privacy interests protected by the Fourth Amendment.

A. A Lawfulness Test Is Firmly Grounded In This Court's Fourth Amendment Jurisprudence

The proper test for determining whether police impermissibly create exigent circumstances is whether the police investigation that precedes the exigent circumstances was lawful. Under that test, "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." *United States* v. *MacDonald*, 916 F.2d 766, 772 (2d Cir. 1990) (en banc), cert. denied, 498 U.S. 1119 (1991).

1. This Court has applied a lawfulness test to determine whether prior police conduct forecloses reliance on other exceptions to the Fourth Amendment's warrant requirement. For example, under the "plain view" exception, police officers may seize incriminating evidence and contraband found in plain view, even if police did not have either a warrant to seize those items or probable cause at the outset to believe those items would be found. See *Coolidge*, 403 U.S. at 466-467. An "essential predicate" of the plain view exception is that "the officer [must] be lawfully located in a place from which the object can be plainly seen." *Horton* v. *California*, 496 U.S.

128, 136-137 (1990). Further, the officer "must also have a lawful right of access to the object itself." *Id.* at 137. In contrast, a plain view seizure is invalid if, before determining that an item is incriminating, the police unlawfully search the item without probable cause. *Arizona* v. *Hicks*, 480 U.S. 321, 325-329 (1987). Thus, under this Court's cases, it is reasonable to dispense with the warrant requirement to allow a police officer to seize incriminating evidence that comes into plain view during a police investigation, so long as each step in the investigation is lawful.

Warrantless searches conducted pursuant to the subject's consent are also permitted if consent is lawfully obtained. In *United States* v. *Watson*, 423 U.S. 411 (1976), the Court rejected the argument that a warrantless search of a car conducted pursuant to the subject's consent is unreasonable where the subject was arrested and not informed that he could withhold his consent to a search. *Id.* at 425. The Court held that if the arrest "comported with the Fourth Amendment," a warrantless search of the subject's car pursuant to his consent was reasonable under the Fourth Amendment because the consent "was not the product of an illegal arrest." *Id.* at 424.

Police also may seize without a warrant items abandoned during a police chase, as long as no Fourth Amendment violation occurred before the suspect discarded the items. Thus, in *California* v. *Hodari D.*, 499 U.S. 621 (1991), the Court concluded that even if police did not have probable cause to arrest a fleeing subject (or even reasonable suspicion to stop him), *id.* at 624 & n.1, drugs discarded by the subject before he was seized by police could lawfully be recovered by police without a warrant, because no seizure occurred until *after* the

drugs were discarded. *Id.* at 629. As long as no Fourth Amendment violation preceded the suspect's abandonment, warrantless seizure of the abandoned contraband is not unlawful. *Id.* at 624, 629.

The question whether prior police conduct forecloses reliance on the exigent circumstances exception should be governed by the same lawfulness standard that applies in other comparable Fourth Amendment contexts. Specifically, police officers act lawfully under the Fourth Amendment when they knock on a door and announce their presence in an effort to obtain voluntary cooperation from the occupants. See *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991) ("The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation."); see also, *e.g.*, *United States* v. *Gould*, 364 F.3d 578, 590 (5th Cir.) (stating that so-called "knock and talk" procedure "has clearly been recognized as legitimate"), cert. denied 543 U.S. 955 (2004). Moreover, seeking consent to search "is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973); *United States* v. *Mendenhall*, 446 U.S. 544, 558-560 (1980). If police officers encounter exigent circumstances during a lawful attempt to gain consent or voluntary cooperation, it is reasonable for them to conduct a warrantless search in response to that exigency, provided they have the requisite probable cause.

2. In contrast, this Court has never required police officers to abstain from lawful investigatory conduct or obtain a warrant when it is foreseeable that someone might react illegally to a consensual encounter. The foreseeability standard adopted by the Supreme Court

of Kentucky, and some other lower courts,[1] thus has no basis in this Court's Fourth Amendment jurisprudence. See Pet. App. 46a.

In the "plain view" context, this Court has squarely rejected a test that turned on whether the circumstances justifying the exception were foreseeable. In *Horton*, the criminal defendant argued that evidence seized from his home pursuant to the plain view exception should be suppressed, because police could have foreseen that they would come across the evidence but chose not to describe it in the warrant application. The Court rejected that argument, stating, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement." 496 U.S. at 138. Once the officer "has a lawful right of access * * * no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent." *Id.* at 140.

By the same token, law enforcement officers are not precluded from taking prompt action to prevent the destruction of evidence merely because, at some point in their investigation, it may have been foreseeable that their lawful investigative efforts might lead to unlawful conduct by criminal suspects. See *Samboy*, 433 F.3d at 160 (rejecting the argument that, in setting up a controlled buy, the police should have foreseen the need for eventual entry into the subject's apartment); see also *United States* v. *Cresta*, 825 F.2d 538, 553 (1st Cir. 1987) ("Unforeseeability has never been recognized as an ele-

[1] See, *e.g.*, *United States* v. *Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008); *United States* v. *Cisneros-Gutierrez*, 598 F.3d 997, 1005-1006 (8th Cir. 2010).

ment of the exigent circumstances exception."), cert. denied, 486 U.S. 1042 (1988).

In fact, a foreseeability test is inconsistent with this Court's decisions authorizing warrantless entries into homes pursuant to an exigency that arises during a "hot pursuit" of a fleeing suspect. When police attempt to effect a warrantless arrest in a public place, see *Watson*, *supra*, it will often be foreseeable that the suspect might flee into a residence, where the police normally could not enter without a warrant, see *Payton*, 445 U.S at 576. That was certainly true of the suspect in *United States* v. *Santana*, 427 U.S. 38 (1976), who was standing in the doorway of her home when police attempted to arrest her. *Id.* at 40. Under a foreseeability standard, the Fourth Amendment would prohibit police from entering a residence in hot pursuit of a fleeing suspect if they could have obtained a warrant before taking whatever investigative steps led to the suspect's flight. In *Santana*, it appears that the police had probable cause to arrest Santana, and to search her residence, but instead of obtaining a warrant, they drove to Santana's residence, got out of their vehicle, shouted "police," displayed identification, and approached Santana's residence. *Id.* at 39-40. Under a foreseeability test, the police would presumably have been precluded from relying on the exigent circumstances of flight and destruction of evidence, because those exigent circumstances would have been foreseeable when the police elected to go to Santana's house without a warrant. But the Court in *Santana* determined that the warrantless arrest of the suspect inside her home was reasonable based both on the exigent need to apprehend a fleeing suspect and on

the "realistic expectation that any delay would result in destruction of evidence." *Id.* at 42-43.[2]

A foreseeability requirement would, in effect, require police to obtain a warrant as soon as they have probable cause to search, instead of seeking voluntary cooperation. Law enforcement officers, however, "are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). In *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), a criminal defendant argued that the warrantless search of his car pursuant to the exigent circumstances exception was unreasonable because the police could have anticipated the need for a search and procured a warrant in advance. The Court rejected this argument, and explained that "[a]ssuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment." *Id.* at 595. To the contrary, the Court stated that "[t]he exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police ac-

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[2] A foreseeability test would make little sense in other comparable Fourth Amendment contexts. For example, the Fourth Amendment permits police officers to ask for consent to search, see *Schneckloth*, 412 U.S. at 227, even though it is foreseeable that the subject might consent, thereby eliminating the need for a warrant. The Fourth Amendment also permits police to seize items abandoned by a fleeing suspect, see *Hodari D.*, 499 U.S. at 629, even though it is foreseeable that when police arrest (or attempt to arrest) a suspect, the suspect might discard evidence.

tion." *Id.* at 595-596; see also *United States* v. *Gardner*, 553 F.2d 946, 948 (5th Cir. 1977) ("[T]he reasonableness of a search [of a home] under exigent circumstances is not foreclosed by the failure to obtain a warrant at the earliest practicable moment."), cert. denied, 434 U.S. 1011 (1978).

With or without probable cause, police may always seek voluntary cooperation. *Schneckloth*, 412 U.S. at 228. Seeking voluntary cooperation is desirable, because a consent search "may result in considerably less inconvenience for the subject of the search." *Ibid.* A test that would prohibit seeking consent or voluntary cooperation in situations where it is foreseeable that the subject will react to the police request in a manner that requires an immediate search or seizure has no basis in Fourth Amendment law.

3. In addition to adopting a foreseeability test, the Supreme Court of Kentucky stated, as have other courts,[3] that police officers cannot rely on exigent circumstances to justify a warrantless search if the officers deliberately created the exigency to avoid the necessity of obtaining a warrant. Pet. App. 45a-46a. The courts below found no suggestion that the officers in this case acted in bad faith to circumvent the warrant requirement, *id.* at 21a, 46a, and respondent did not argue that the officers acted in bad faith either in the courts below or in the brief in opposition to the petition for a writ of certiorari. The Court therefore need not decide in this case whether a search that is otherwise lawful under the

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[3] See, *e.g.*, *United States* v. *Chambers*, 395 F.3d 563, 569 (6th Cir. 2005); *United States* v. *Gould*, 364 F.3d 578, 590-591 (5th Cir), cert. denied, 543 U.S. 955 (2004); *United States* v. *Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990), cert. denied, 516 U.S. 852 (1995); *United States* v. *Socey*, 846 F.2d 1439, 1449 (D.C. Cir.), cert. denied, 488 U.S. 858 (1988).

exigent circumstances doctrine could be rendered unlawful by the subjective intent of the police officers. See *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635-636 (1967) (holding that Court will not revisit factual findings concurred in by two lower courts pursuant to the "two-court rule"); see also *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991) (declining to consider argument that respondent did not raise in courts below); *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002) (declining to consider alternative ground for affirmance neither decided by court below nor raised in brief in opposition). In any event, a test that considers a police officer's subjective motivation in choosing a particular investigatory technique cannot be squared with this Court's Fourth Amendment jurisprudence.

This Court has "repeatedly rejected" Fourth Amendment tests that turn on a police officer's subjective intent. *Brigham City*, 547 U.S. at 404. For example, this Court has held that the "emergency aid" exception to the warrant requirement "does not depend on the officers' subjective intent" in entering a home and "requires only an objectively reasonable basis for believing that a person [therein] is in need of immediate aid." *Fisher*, 130 S. Ct. at 548 (citation and internal quotation marks omitted); see also *Brigham City*, 547 U.S. at 403. The Court has also made clear that a police officer's subjective motivation for conducting a traffic stop is irrelevant where the officer had probable cause to believe that the suspect had violated a traffic law. *Whren* v. *United States*, 517 U.S. 806, 813 (1996). These cases follow this Court's longstanding view that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that

depend upon the subjective state of mind of the officer." See *Horton*, 496 U.S. at 138.

The Court has found it appropriate to consider the subjective motivations of police officers only in very narrow circumstances involving programmatic searches conducted without individualized suspicion. See, *e.g.*, *Florida* v. *Wells*, 495 U.S. 1, 4 (1990) ("inventory search" of lawfully seized property—conducted for the limited purposes of ensuring that the property is not dangerous, securing valuables, and protecting against claims of loss or damage—must not be "a ruse for a general rummaging in order to discover incriminating evidence"). As the Court explained in *Whren*, such suspicionless searches are reasonable under the Fourth Amendment because they achieve important programmatic purposes, such as taking inventory of seized property or monitoring compliance with administrative regulations. 517 U.S. at 811-812. The Court's inquiry into law enforcement purpose in programmatic search cases simply ensures "that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Ibid.*; see also *Brigham City*, 547 U.S. at 405 ("[The] inquiry * * * has nothing to do with discerning what is in the mind of the individual officer conducting the search.").

Unlike such programmatic searches, a search conducted pursuant to the exigent circumstances exception must be supported by probable cause. See, *e.g.*, *Kirk*, 536 U.S. at 636; *Steagald*, 451 U.S. at 212. Where probable cause exists, this Court's precedents establish that an objective standard must be employed to determine whether a warrantless search is justified.

B. A Lawfulness Test Properly Balances The Privacy Interests At Stake With The Needs of Law Enforcement

To determine whether a warrantless search is reasonable under the Fourth Amendment, this Court's Fourth Amendment cases "balance the privacy-related and law enforcement-related concerns to determine if the intrusion [i]s reasonable." *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001). That balance mandates a test that allows police to react to exigent circumstances that arise in the course of a lawful police investigation, even when the exigency could be considered foreseeable.

1. a. Police officers in the field "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 214 (1979). As a result, "the object in implementing [the Fourth Amendment's] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); see also *Dunaway*, 442 U.S. at 213-214 (stating that rules governing police investigations should provide "[a] single, familiar standard"). A lawfulness test rooted in established Fourth Amendment law is easy for police officers to understand and apply.

In this case, the investigating officers employed a series of lawful investigative techniques during a quickly unfolding situation. They gathered information about a suspect who had just engaged in a felony drug trafficking offense and was thereafter seen running. They attempted to determine which of two apartments the suspect had entered. Being unsure, they knocked on the door that they concluded had recently been opened and

announced their presence in an effort to gain voluntary cooperation from the occupants, and waited for a response. When they concluded that the occupants were destroying evidence, they entered the apartment to respond to that exigency. At each step, the officers chose reasonable investigatory techniques based on familiar and clear rules governing what the Fourth Amendment allowed.

b. In contrast, the foreseeability test adopted by the Supreme Court of Kentucky would provide, at best, murky guidance to police officers in the field. The test would require case-by-case reasonableness inquiries without clear principles to guide evaluation of each case. Notably, this Court has specifically rejected such case-by-case inquiries in other Fourth Amendment contexts. See, *e.g.*, *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (rejecting rule that would require case-by-case adjudication of whether search incident to lawful arrest was justified based on "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found"); see also *Atwater*, 532 U.S. at 347 ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations * * * lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

The Supreme Court of Kentucky's approach to exigent circumstances would allow for unjustified judicial second-guessing of police investigative decisions. Before knocking on a door, police officers will have to predict whether a court would later determine that it was reasonably foreseeable that their chosen investigative technique would give rise to exigent circumstances in a

particular case. A rule that requires police officers to make such predictions would be far from "clear and simple." *Atwater*, 532 U.S. at 347.

To take just one example arising from the decision below, the Supreme Court of Kentucky seemed to take the view that it is always reasonably foreseeable that drug suspects will destroy evidence when police knock at the door. Pet. App. 47a. Such a categorical rule, however, is difficult to reconcile with this Court's rejection of the idea that it is sufficiently likely that drug suspects will destroy evidence when police announce their presence that the Court should in all drug cases excuse compliance with the requirement that police knock and announce before executing a search warrant. See *Richards* v. *Wisconsin*, 520 U.S. 385, 387 (1997). Similar problems can be expected to proliferate in other areas of the law under case-by-case foreseeability inquiries, particularly when there are no clear principles to govern whether a case should fall on one side of the line or the other.

c. In addition to being difficult to apply, the foreseeability test has unacceptable consequences. First, it rewards individuals who respond to lawful police investigatory decisions by destroying evidence. The Fourth Amendment's warrant requirement is not designed to protect an individual's ability to destroy evidence or contraband. Indeed, under 18 U.S.C. 2232(a), it is a criminal offense to "prevent[] or impair[]" the seizure or securing of property by destroying or removing it before the property is lawfully seized or secured by federal authorities. Evidence should not be suppressed to safeguard the ability of individuals to escape responsibility for one crime by destroying evidence of it, and in the process committing a second criminal offense.

In *Segura* v. *United States*, 468 U.S. 796 (1984), this Court rejected the premise that an individual's interest in destroying incriminating evidence is a valid basis for excluding evidence. In *Segura*, the district court held that evidence obtained during a warrantless entry into a home to secure the premises while police obtained a search warrant could not be admitted under the "independent source" doctrine, because had the police not illegally entered to secure the premises, the suspect likely would have destroyed the evidence. *Id.* at 801-802. In determining that the evidence was admissible, the Court rejected the district court's "prudentially unsound" rationale, stating that there is no "'constitutional right' to destroy evidence," and that the exclusionary rule should not be extended to "'protect' criminal activity." *Id.* at 816; see also *MacDonald*, 916 F.2d at 771 (exigent circumstances should not be "disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity").

A foreseeability test also has the perverse result of providing greater Fourth Amendment protection to persons as to whom police have greater suspicion of criminal wrongdoing. It is undisputed that the police may lawfully seek voluntary cooperation by knocking on the door to the residence of a person as to whom they lack probable cause. Cf. *Schneckloth*, 412 U.S. at 228; *Bostick*, 501 U.S. at 439. Thus, if the police have reasonable suspicion to believe that a suspect is involved in drug trafficking, they may knock at the suspect's door and seek voluntary cooperation, and, if probable cause develops, they may respond to any ensuing exigency, even though it may have been reasonably foreseeable that the suspect might try to destroy evidence. Under the test

adopted by the Supreme Court of Kentucky, however, police would be foreclosed from responding to such an exigency if they had greater reason to suspect the occupants of criminal activity. Nothing in the Fourth Amendment requires such a counter-intuitive result.

Finally, a foreseeability standard would deter police officers from engaging in lawful police work for fear that a reviewing court would determine that the investigation created a foreseeable risk of exigency. For example, if police have an opportunity to make a public arrest of a criminal suspect outside a residence, but they foresee that another suspect inside the residence might react by destroying evidence, police may have to choose between delaying the arrest or making the arrest and being left powerless to respond to the exigency if the suspect inside begins to destroy evidence. Similarly, police sometimes will wish to continue surveillance of a suspect when they have probable cause to arrest, in order to gather evidence of a larger criminal organization. But under a foreseeability standard, delaying arrest would be risky, because it is arguably foreseeable that the suspect might detect that police have him under surveillance. These detrimental effects on effective law enforcement weigh heavily against adopting a foreseeability standard.[4]

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[4] Some lower courts have adopted standards somewhat different from the foreseeability test adopted by the Supreme Court of Kentucky. For example, some courts have evaluated "the reasonableness and propriety of [the police's] actions and investigative tactics," *United States* v. *Coles*, 437 F.3d 361, 370 (3d Cir. 2006), or held that officers may not conduct a warrantless search pursuant to the exigent circumstances exception if the officers' prior actions were "contrary to standard or good law enforcement practices." *Gould*, 364 F.3d at 591. Such standards are no better than the foreseeability standard. Nothing in this Court's Fourth Amendment jurisprudence justifies the creation of

2. A rule that allows police to respond to exigencies that arise during lawful investigations does not undermine the privacy interests protected by the Fourth Amendment. Exigency excuses the police from the necessity of obtaining a warrant; it does not exempt them from the Fourth Amendment's requirement that they have probable cause to search or arrest. See, *e.g.*, *Kirk*, 536 U.S. at 636; *Steagald*, 451 U.S. at 212. The exigent circumstances exception would therefore remain limited to situations where police have probable cause, and thus a warrant authorizing entry could lawfully have been obtained had the exigency not precipitated the need for immediate action.

Moreover, police officers will still have a strong incentive to obtain a warrant where circumstances allow. An investigative strategy that relies on the creation of exigent circumstances to justify a warrantless entry poses significant risks. The success of such a strategy would depend on the possibility that the suspect would react to the government's request for voluntary cooperation by destroying evidence. If the suspect ignores the officer's request for voluntary cooperation and takes no steps to destroy evidence, "the investigation will have reached a conspicuously low point. The officers will have to leave, and the [occupants] will have the kind of warning that even the most elaborate security system cannot provide." *United States* v. *Chambers*, 395 F.3d 563, 577 (6th Cir. 2005) (Sutton, J., dissenting); see also

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a body of case law defining police conduct that, although lawful, is unreasonable under the Fourth Amendment because it does not comply with a court's view of "reasonable investigative tactics" or "good law enforcement practice." Moreover, such standards do not provide clear direction to law enforcement officers in the field about whether their investigative decisions are permissible under the Fourth Amendment.

Etchin, 614 F.3d at 733 ("Police who without a warrant knock on the door of a drug house seeking consent to enter take the risk that permission will be withheld and an emergency will not materialize."). Given this possibility, police officers will have a strong incentive to secure a warrant when that option is available.

C. The Police Officers In This Case Did Not Impermissibly Create An Exigency

Under the lawfulness standard, the judgment of the Supreme Court of Kentucky must be reversed. The trial court found that the police officers "properly conducted" their investigation by "knocking on the door of [an] apartment unit and awaiting [a] response or consensual entry." Pet. App. 9a. Knocking on the door of a residence to seek voluntary cooperation or consent "has clearly been recognized as legitimate." *Gould*, 364 F.3d at 590; see also *Schneckloth*, 412 U.S. at 228 (seeking consent "is a constitutionally permissible and wholly legitimate aspect of effective police activity"). The Supreme Court of Kentucky erred by concluding that, even if exigent circumstances existed, the police officers' entry was unlawful under the Fourth Amendment because it was reasonably foreseeable that the occupants might destroy evidence. For that reason, the judgment should be reversed.[5]

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[5] In opposing the petition for a writ of certiorari, respondent argued that, under the circumstances of this case, there was an insufficient factual basis for a reasonable belief that exigent circumstances existed to justify a warrantless entry. Br. in Opp. 8-10, 13, 15, 21. The trial court, however, found that, upon hearing movement in the apartment, the police "reasonably concluded * * * persons [were] in the act of destroying evidence." Pet. App. 9a. The Kentucky Court of Appeals reached the same conclusion. Pet. App. 24a. The Supreme Court of Kentucky "assum[ed] for the purpose of argument that exigent cir-

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

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cumstances existed" (*id.* at 43a), and therefore did not take issue with the contrary determinations of the lower courts. This Court can appropriately reverse the judgment below, and remand the case for the lower courts to address, as appropriate, that case-specific issue. See, *e.g.*, *United States* v. *Cronic*, 466 U.S. 648, 666-667 & n.42 (1984) (reversing ruling of court of appeals that ineffective assistance of counsel should properly be presumed, and remanding for court of appeals to address question whether trial counsel was actually ineffective, which had not been passed upon by court of appeals); cf. *Skilling* v. *United States*, 130 S. Ct. 2896, 2934 (2010) (holding that indictment was flawed, but leaving for resolution on remand whether error was harmless).

AMICUS CURIAE BRIEF

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No. 09-1272

In the
Supreme Court of the United States
October Term, 2010

COMMONWEALTH OF KENTUCKY,
Petitioner,

vs.

HOLLIS DESHAUN KING,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF AMICI CURIAE of AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF PETITIONER.

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INTEREST OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Timely notice of intent to file this brief has been served upon Counsel for each party. Consent to file has been granted by Counsel for the Petitioner and Counsel for the Respondent. Letters of consent of the Petitioner and Respondent have been filed with the Clerk of this Court, as required by the Rules.[1]

Americans for Effective Law Enforcement, Inc. (AELE), as a national not for profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: this brief was authored for the *amici* by James P. Manak, Esq., Counsel of Record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc. made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), was founded in 1893 and is the largest organization of police executives and line officers in the world. IACP's mission, throughout the history of the association, has been to identify, address and provide solutions to urgent law enforcement issues.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America. It conducts programs of training, publications and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of formulating rules and policies on warrantless searches and the safety of police officers in conducting their sworn duties; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of training and policies on the subject.

Because of the relationship with our members and the composition of our membership and directors, including active law enforcement administrators and counsel, we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

This brief concerns policy and legal issues, including the importance of effective rules, procedures and training for conducting warrantless searches and the protection of law enforcement officers from injury and death as they perform their duties. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues as these in conducting warrantless searches based upon exigent circumstances.

STATEMENT OF THE CASE

Police officers entered an apartment building in pursuit of a person who sold crack cocaine to an undercover informant. They heard a door slam, but were not certain which of two apartments the offender had entered. A strong odor of marijuana came from one of the doors, and the officers believed the trafficker had entered that apartment.

After knocking on the door the officers heard noises indicating that physical evidence was being destroyed. Faced with exigent circumstances that reasonably indicated that evidence was being destroyed, the officers entered the apartment and found large quantities of drugs.

The Kentucky Supreme Court, *King v. Commonwealth*, 302 S.W. 3d 649 (Ky. 2010) held that this evidence should have been suppressed, ruling *inter alia*, that the exigent circumstances exception to the Fourth Amendment warrant requirement did not apply because the officers had themselves created the exigency by knocking on the door.

This Court granted certiorari on the issue: "When does lawful police action impermissibly 'create' exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?" The issue is of utmost importance to police administrators and trainers because they must know how this Court will resolve the split in the courts in the United States and whether the Court will adopt a rule that is not only faithful to Fourth Amendment principles but workable for day-to-day police operations.

SUMMARY OF ARGUMENT

The Kentucky Supreme Court has created an unworkable test for determining when police can enter a residence without a warrant to seize evidence based upon exigent circumstances. The court pointed out that there is a split among the federal circuit courts of appeals on this issue. In fact, there are five different tests that the various circuits have been using to determine when police may rely upon exigent circumstances for warrantless entry of premises. These tests are, the First and Seventh Circuits: unreasonable delay in obtaining a warrant;

the Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits: unreasonable delay in obtaining a warrant coupled with deliberate conduct in an attempt to evade the warrant requirement; the Third and Fifth Circuits: bad faith and unreasonable police action; the Fourth and Eighth Circuits: foreseeability of results of police action resulting in exigent circumstances; and the Second Circuit: lawfulness of police conduct. The state courts vary to an even greater degree, many of which have pieced together hybrid tests, using various portions of different federal circuit rules.

Amici take the position that these different and conflicting tests restrict lawful police action and effectively negate the exigent circumstances exception to the warrant requirement. In the Third and Fifth Circuits, for example, exigent circumstances must exist prior to police arrival, otherwise the police presence will be deemed to have created any exigent circumstances that may arise. In the Fourth and Eighth Circuits police may not rely on any exigencies if they were a foreseeable result of police action. However, since the police are trained to expect an illegal response, all reactions from suspects would be foreseeable.

These tests reward illegal action in response to a lawful knock on the door by the police. They are basically unusable, and the courts that have adopted them are, in reality, attempting to narrow and negate the exigent circumstances exception to the warrant requirement to the point of virtual non-existence.

The position of *amici* is that the exigent circumstances exception to the warrant requirement

should be governed by the Reasonableness Clause of the Fourth Amendment. We ask the Court to adopt an objective reasonableness standard for law enforcement that looks at the totality of the circumstances to determine whether officers' warrantless entries into premises pursuant to exigent circumstances is proper under the Fourth Amendment. We ask the Court to adopt a uniform rule that will apply to all jurisdictions under the Fourth Amendment so that officers—no matter what jurisdiction they are in—will have clear guidance for training and operational purposes. We believe that the lack of a clear, uniform rule on exigent circumstances for police entry of premises to prevent destruction of evidence also results in a distinct danger to the safety of law enforcement officers due to the uncertainty of how the myriad of rules operates, resulting in the diminished ability of officers to take self-protective action while engaged in law enforcement evidence-gathering activities.

ARGUMENT

THE COURT SHOULD ADOPT AN OBJECTIVE REASONABLENESS STANDARD FOR LAW ENFORCEMENT ACTIVITY THAT CONSIDERS THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE WHEN OFFICERS' WARRANTLESS ENTRIES INTO PREMISES PURSUANT TO EXIGENT CIRCUMSTANCES IS PROPER UNDER THE FOURTH AMENDMENT; LAW ENFORCEMENT OFFICERS NEED CLEAR GUIDANCE AND A UNIFORM RULE FOR TRAINING AND OPERATIONAL PURPOSES AND FOR THEIR

SAFETY IN DEALING WITH DANGEROUS OFFENDERS.

Amici will not repeat the legal arguments put forward by the Petitioner in this case, in particular the review of the case law from the circuit courts of appeals and the state courts on the various rules pertaining to exigent circumstances; we do, however, support them. As national representatives of law enforcement officers, administrators and legal advisors, we wish to inform the Court of certain policy considerations from our professional perspective.

A visitor from a foreign country would perhaps view the myriad of different and conflicting federal and state court rules on the exigent circumstances doctrine with some degree of perplexity. This especially in light of the fact that all of the court cases cited by both petitioner and respondent are construing and applying the same seminal document—the Fourth Amendment (as opposed to state constitution equivalents—independent state grounds). *Amici* are not unfamiliar with this type of problem. We are hampered in setting training, policy and conduct standards for our constituents—local, state and federal law enforcement agencies. We submit that the Framers did not think that the Fourth Amendment would mean different things in different jurisdictions of the federal union. And we applaud the Court for accepting appeal in this case to resolve this conflict.

Amici submit, however, that resolution of this issue is easily reached. This Court has already

supplied the necessary mechanism for resolving the issue. We defer to some well-established case law of the Court to illustrate our point.

This Court has long recognized that "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Court has said that warrantless searches and seizures are presumptively unreasonable and are therefore prohibited under the Fourth Amendment, unless an exception applies. *California v. Acevedo*, 500 U.S. 565, 580 (1991) ("It remains a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." ; *see also Katz v. United States*, 389 U.S. 347, 357 (1967). "Such exceptions are based on the Supreme Court's determination that a particular search is reasonable, that is, that the government's legitimate interests in the search outweigh the individual's legitimate expectation of privacy in the object of the search." *United States v. Salmon*, 944 F.2d 1106, 1120 (3d Cir. 1991).

The Court has determined that one exception to the warrant requirement is that of exigent circumstances, *Mincey v. Arizona*, 437 U.S. 385 (1978). The Kentucky lower courts, like most courts, have recognized this exception. They have held the exception applies in situations in which an officer reasonably believes that there is a possibility that evidence of a serious crime may be destroyed. In the case of a private residence there must also be

probable cause. *Taylor v. Commonwealth*, 577 S.W.2d 46, 48 (Ky.App. 1979); *Baltimore v. Commonwealth*, 119 S.W.3d 532, 538 (Ky.App. 2006); *Southers v. Commonwealth*, 210 S.W.3d 173, 176 (Ky.App. 2006).

Here, as the officers reached the middle of the apartment building's hallway, they smelled a strong odor of burnt marijuana. As they came closer to respondent's door, they reasonably believed that the odor was coming from that apartment. A police officer testified that after knocking and announcing the presence of the police, there was no response to his request to open the door, but he heard the sounds of concerted movement within the apartment. Based upon well-established experience with those who ply the drug trade, the police reasonably believed that evidence of a drug felony was in the apartment and that the occupants of the apartment were in the process of destroying the evidence. At this point they entered and found narcotics.

In the brief filed by *Amici* in *Brigham City v. Stuart*, 547 U.S. 398 (2006) we argued, and the Court agreed, that the core element of the Fourth Amendment is reasonableness. Thus, although a warrantless entry into one's home by police is presumptively unreasonable, "that presumption can be overcome." *Michigan v. Fisher*, ___ U.S. ___, 130 S.Ct. 546, 548 (2009). "For example, 'the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable,'" quoting *Mincey v. Arizona*, *supra*, 393-94.

The test for probable cause does not include the subjective intentions of officers when judicial review is considered. *Whren v. United States*, 517 U.S. 806, 818 (1996) ("subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). It is strictly an objective reasonableness test. As this Court said in the context of the emergency assistance exception in *Brigham, supra,* at 404, ". . . whether the officers' motivation for entering is to arrest suspects and gather evidence or to assist the injured is irrelevant so long as the circumstances objectively justify the action."

This Court has already made clear that the exigent circumstances exception is evaluated using the totality of the circumstances known to the police at the time. *See, Mincey, supra*, 393-94. In resolving the conflict in the federal and state courts and clarifying the appropriate test to be used in exigent circumstances cases, such as the instant case, it is respectfully submitted that the Court has no farther to look than its own adoption of the objective reasonableness, totality of the circumstance test that it has used in the past for resolution of Fourth Amendment issues in general. Under this test the mere fact that an officer used a proper "knock and talk" procedure as an initial approach to an apartment door would simply be one fact among many in the totality of the circumstances.

From the position of *amici*'s law enforcement constituents the need to resolve this conflict in the courts is also "exigent." The confusion that abounds in the courts has led to uncertainty in training, setting policy and internal reviews of police conduct,

in cases similar to this case. When officers are uncertain about the limits of their authority in conducting drug arrests and searches and hesitate in pursuing leads and information when dealing with violent drug dealers, they are also susceptible to injury and death. Thus, this case presents the additional issue of officer safety. *Amici* respectfully request the Court to end the conflict in the courts and apply the objective reasonableness test based upon the totality of the circumstances in exigent circumstances search cases. In doing so the Court will not be creating new law, but simply applying its own well-established jurisprudence to this area of Fourth Amendment activity.

CONCLUSION

Amici Curiae respectfully request the Court to reverse the Supreme Court of Kentucky and establish objective reasonableness based upon the totality of the circumstances as the standard for the exigent circumstances exception to the warrant requirement. We ask the Court to uphold the constitutionality of the law enforcement conduct involved in this case on the law and as a matter of sound judicial policy.

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State of South Dakota

QUESTION PRESENTED

When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of the Petitioner. As the principal agents of criminal prosecutions across the country, States have a compelling interest in clear rules for police officers who encounter situations where evidence may be destroyed unless they take immediate action.

SUMMARY OF THE ARGUMENT

Police frequently conduct, and lower courts affirm as reasonable, warrantless residential searches where the destruction of evidence appears imminent. This exception to the warrant requirement is very important for successful police work and criminal prosecution. Without the exception, much tangible evidence would be destroyed and the police would be forced to "resort to such other sources of evidence as eyewitness identifications and confessions," thus increasing the possibility "that the innocent will be convicted and the guilty go free." Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1465 (1971). The Court should confirm that it is reasonable under the Fourth Amendment for police to conduct a search of a home without a warrant where a reasonable

observer would believe the search necessary to prevent the imminent destruction of evidence.

The decision below accepted the general proposition that police may conduct a warrantless search of a dwelling where they reasonably fear the imminent destruction of evidence. The Kentucky Supreme Court even accepted that the police in this case did reasonably fear the imminent destruction of evidence. Pet. App. at 46a. The court, however, ruled that the police effectively manufactured that exigent circumstance by knocking on the door of the dwelling they ultimately searched and announcing themselves as police officers. *Id.* The police, the court ruled, should have foreseen that this action would prompt individuals within the dwelling to begin the very destruction of evidence that prompted the subsequent warrantless search. *Id.* Where such destruction is a reasonably foreseeable consequence of police conduct, the Kentucky Supreme Court ruled, it cannot justify the warrantless search. *Id.* Thus, the central question of this case is whether courts may blame police for prompting individuals to destroy evidence as a pretext for conducting a warrantless search.

The *amici* States agree with Kentucky that, when police action sparks a chain of events ending with a warrantless search based on exigent circumstances, courts should ask only whether the police initially acted in an objectively lawful manner. In no event, moreover, should courts inquire as to the subjective motives of police, or the foreseeability of the exigent circumstances that police action supposedly

precipitated, when examining whether a warrantless search is reasonable.

A bad faith test in exigent circumstances cases would be inconsistent with Fourth Amendment precedents generally, where the subjective motivations of the police are never relevant. A foreseeability inquiry would frequently doom warrantless searches because it is nearly always foreseeable that a suspect will react to a sudden police presence—even when perfectly lawful—by destroying evidence of guilt. Yet if police prompt such behavior merely by lawfully carrying out their duties, preventing them from acting upon others' foreseeable reactions would protect no core Fourth Amendment values. Particularly because split-second decisions are inherent in police work, officers and citizens alike deserve a test that is reasonably predictable, easy to apply, and geared toward protecting only those Fourth Amendment privacy interests the Court has recognized as legitimate.

ARGUMENT

I. The Reasonable Fear of the Destruction of Evidence Provides an Important Exception to the Warrant Requirement

For decades courts have deemed it reasonable for police to enter a dwelling without a warrant where they reasonably fear the imminent destruction of evidence. *See* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.5(b) (4th ed. 2004). In such cases, the compelling government interest in preserving evidence of crime,

which for purposes of terminating criminal enterprises can be just as important as arresting suspects, outweighs the legitimate privacy expectations of residents. *Id.* at 321. This exception to the warrant requirement is very important if police are to continue with their mission of detecting and disrupting crime.

1. It is axiomatic that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona,* 437 U.S. 385, 393-94 (1978). The category of permissible warrantless "exigent circumstances" searches includes, for example, entering residences to aid an individual in need of assistance, *see id.*, breaking up a drunken brawl, *see Brigham City v. Stewart*, 547 U.S. 398, 404 (2006), and fighting a fire and discovering its causes, *see Michigan v. Tyler,* 436 U.S. 499, 509 (1978). It also includes hot pursuit of suspects into a residence. *See United States v. Santana*, 427 U.S. 38, 42 (1976).

The Court has stated that "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). More to the point, "[i]n a wide range of fast-breaking situations—hot pursuits, crimes in progress, and the like—a warrant requirement would be foolish." Akhil Reed Amar, *Fourth Amendment First Principles,* 107 Harv. L.

Rev. 757, 768 (1994). Such "necessarily swift action predicated upon the on-the-spot observations of the officer . . . historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

2. The destruction-of-evidence exception to the warrant requirement goes back at least to *Johnson v. United States*, 333 U.S. 10 (1948), and *McDonald v. United States*, 335 U.S. 451 (1948), where the Court affirmed the suppression of evidence obtained from warrantless residential searches because, among other reasons, "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15; *see also McDonald*, 335 U.S. at 455 (concluding that officers had ample time to procure a warrant and noting that the evidence was not "in the process of destruction").

A few years later in *United States v. Jeffers*, 342 U.S. 48, 52 (1951), the Court suppressed evidence obtained through a warrantless search of a hotel room because the officers could have "easily prevented any . . . destruction or removal [of evidence] by merely guarding the door." *See also Preston v. United States*, 376 U.S. 364, 367 (1964) ("The rule allowing contemporaneous searches is justified, for example, by . . . the need to prevent the destruction of evidence of the crime"); *Wong Sun v. United States*, 371 U.S. 471, 483-84 (1963) (noting that the "Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence[.]").

Confirming that ongoing or imminent destruction of evidence can justify a warrantless search, a plurality of the Court in *Ker v. California*, 374 U.S. 24, 40 (1963), affirmed a warrantless search based in part on officers' fears that evidence was about to be destroyed. The officers' conduct in the "particular circumstances" of the case—including "the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed"—was reasonable. *Id.* at 40-41. Even the *Ker* dissenters allowed that "unannounced police intrusion into a private home" is reasonable "where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted." *Id.* at 47 (Brennan, J., dissenting).

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court deemed reasonable a warrantless extraction of blood from a suspected drunk driver in light of the body's relatively fast absorption and discharge of alcohol. *Id.* at 770-71. As the Court observed, "[t]he officer in the present case . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence[.]'" *Id.* at 770. The Court later ruled, however, that the need to preserve evidence of blood-alcohol-content does not always justify a warrantless residential search because the "application of the exigent-circumstances exception in the context of a home

entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case [a traffic offense], has been committed." *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

Over the years, a destruction-of-evidence exception has essentially become axiomatic. *See, e.g., Brigham City*, 547 U.S. at 403 (citing *Ker* for the proposition that a warrantless residential search is justified by "imminent destruction of evidence"); *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006) ("a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement"); *Tyler*, 436 U.S. at 509 (same); *United States v. Watson*, 423 U.S. 411, 435 (1976) ("When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence.").

Yet the standard for this exception has not always been articulated in the same way. In *Vale v. Louisiana*, 399 U.S. 30, 33 (1970), the Court invalidated a residential search where "the goods ultimately seized were not *in the process* of destruction . . . nor were they about to be removed from the jurisdiction." *Id.* at 35 (emphasis added). More recently the Court has suggested that merely perceiving a reasonable risk of destruction is enough. In *Illinois v. McArthur*, 531 U.S. 326 (2001), the Court ruled that keeping the suspect from entering

his house while police awaited a warrant did not violate the Fourth Amendment because "the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant." *Id.* at 332; *see id.* at 337 (Souter, J., concurring) ("This probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement."). Similarly, in *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006), the Court noted that one tenant's objection to a residential search when the other tenant consented might create exigent circumstances justifying a warrantless search unless the tenant could be incapacitated from destroying evidence.

Lower courts have generally understood *Schmerber* and its antecedents to bless warrantless searches when police reasonably fear the imminent destruction or removal of evidence—where, for example, there is a "great likelihood that the evidence will be destroyed or removed before a warrant can be obtained" or evidence is "threatened with imminent removal or destruction." *See, e.g.*, LaFave, *supra*, at 394; *State v. Patterson*, 192 Neb. 308, 316 (Neb. 1974); *United States v. Blake*, 484 F.2d 50, 54 (8th Cir. 1973). The Third Circuit, for example, found that when officers "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." *United States v. Rubin*, 474 F.2d 262, 268 (1973). Although the tests used by the lower courts vary, "the emergency circumstances exception is 'established[,]'" and

accepted as a valid exception to the warrant requirement. LaFave, *supra*, at 393 (internal quotation omitted).

3. Preventing the destruction of evidence—which is a crime in itself—is an important law enforcement goal. "The strongest justification for restricting the destruction of evidence is that destruction reduces the likelihood that the judicial process will reach accurate results." Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L.J. 1085, 1138 (1987).

The destruction-of-evidence exception has become exceedingly important to proper police work. "[T]angible evidence" is rightly considered a more "trustworthy—'scientific'—method of proving guilt[,]" and if the police must stand idly by while suspects destroy this evidence, "the possibility is increased that the innocent will be convicted and the guilty go free." Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1465 (1971). Without the exception, "drug dealers [can] flush evidence down the toilet, often frustrating meticulous police investigations, denying police the tactical element of surprise, and increasing the peril police officers face[.]" Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-Of-Evidence Exception*, 93 Colum. L. Rev. 685, 702 (1993).

The exception is especially important in drug cases because "[u]nlike most other evidence, drugs

can usually be destroyed with the flush of a toilet or the opening of a tap." Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Protect Destruction of Evidence: The Need for a Rule*, 39 Hastings L. J. 283, 284 (1988). Even if the police are able to arrest the main suspect, the threat of destruction is often not over because "[p]ersons not theretofore involved in a particular criminal scheme may nonetheless be expected to dispose of evidence when doing so will possibly aid a friend or relative[.]" LaFave, *supra*, at 404.

The Court should reaffirm the destruction-of-evidence exception to the warrant requirement where officers have a reasonable fear that evidence will be destroyed pending a warrant. As the Court has long understood, "[s]uspects have no constitutional right to destroy or dispose of evidence." *Ker*, 374 U.S. at 39.

II. Neither the Subjective Intent of Police Officers Nor the Foreseeability of the Destruction of Evidence Is Relevant to Fourth Amendment Analysis

Whether police may enter and search a residence without a warrant based on reasonable concern for the imminent destruction of evidence should turn only on objective circumstances, not on the subjective motivations of the officers or foreseeable consequences of lawful police conduct.

A. Subjective intent never taints an objectively proper search predicated on individualized suspicion

The Kentucky Supreme Court held that in destruction of evidence cases, courts must first determine "whether the officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement," but ultimately found no bad faith. Pet. App. at 45a-46a. Recently, however, in *Brigham City v. Stuart*, 547 U.S. 398 (2006), the Court rejected exactly this approach and upheld a long line of Fourth Amendment doctrine when it affirmed an asserted "bad faith" warrantless residential police entry to stop a fight. The Court reaffirmed that "[a]n action is reasonable under the Fourth Amendment regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify action.'" *Id.* at 404 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). In short, "[t]he officer's subjective motivation is irrelevant." *Id.*

This rule has prevailed at least since *United States v. Robinson*, 414 U.S. 218 (1973), where the Court upheld a search incident to arrest that was objectively justified by concern for the officer's safety, despite the officer's apparent subjective lack of fear during the encounter. Said the Court, "it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed." *Id.* at 236.

A few years later, in *Scott v. United States*, 436 U.S. 128 (1978), the Court, citing *Robinson*, upheld a wiretap search where officers intercepted extraneous conversations. These unauthorized interceptions were reasonable "because the court could not conclude that some conversation was intercepted which clearly would not have been intercepted had reasonable attempts at minimization been made." *Id.* at 134 (internal quotation omitted). Having concluded that the interceptions were objectively reasonable, the Court refused even to entertain whether the police acted in bad faith, stating that "[s]ubjective intent alone does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136.

Significantly, the *Scott* Court observed that *Robinson* "held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. *See also Horton v. California*, 496 U.S. 128, 138 (1990) ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement."); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force[.]"); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (Court ignored as "irrelevant" the fact that the police were specifically looking for

the marijuana when they flew over the yard and saw it in plain sight); *Maryland v. Macon*, 472 U.S. 463, 471 (1985) ("Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence.").

The Court confirmed the exclusive Fourth Amendment relevance of objective justification (rather than subjective intent) in *Whren v. United States*, 517 U.S. 806 (1996), where police stopped a car for a traffic violation and observed illegal narcotics in plain view. The defendants accepted that the officer had probable cause for the traffic code violation, but argued that the test should be whether a police officer acting in good faith would have made the stop for that reason rather than as a pretext for conducting a plain-view search. The Court rejected that argument, holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Indeed, "[t]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814; *see also Bond v. United States*, 529 U.S. 334, 339 n.2 (2000) ("the issue is not [the agent's] state of mind, but the objective effect of his actions.").

The reason for the Court's consistent adherence to the objective justification standard is straightforward. Retrospective subjective inquiry into the knowledge and beliefs of police officers as their work unfolds produces irreconcilable problems

for the officers and the finders of fact. It is simply not possible to "neatly unravel[]" a person's subjective motivations. *Brigham City*, 547 U.S. at 405. "Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815; *see also Scott*, 436 U.S. at 756 ("The subjective intent of the monitoring agents is not a sound basis for evaluating the legality of the seizure."). As the Court observed in *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (quoting *Horton v. California*, 496 U.S. at 138), "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

These concerns are as applicable to fears of destruction of evidence as they are to findings of probable cause. A court cannot effectively or consistently determine whether a police officer acted with bad faith in conducting a warrantless search because of a perceived exigency. Indeed, a bad faith test requires the court to engage in ad hoc, fact-specific balancing in every case as it determines whether it believes the police acted with good intentions. And in any event, the Fourth Amendment's concern for reasonableness is by nature an objective inquiry that precludes considerations of officers' subjective bad faith. Accordingly, in other contexts, the Court has precluded reliance on exigent circumstances to justify a warrantless search only where it was

objectively apparent that the exigency had passed. *See, e.g., Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). The bad-faith test applied by the Kentucky Supreme Court contravenes the Court's longstanding precedents and should be rejected.

B. The foreseeability of others' destruction of evidence is not a barometer of reasonableness

If the subjective intent of a police officer does not determine the constitutionality of a search, it makes even less sense to find a Fourth Amendment violation based on the (often illegal) reaction by the suspect to lawful police action, as the decision below did. Pet. App. at 46a (holding that courts must determine "[w]hether, regardless of good faith, it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances relied upon to justify a warrantless entry"); *see also United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008) (holding that officers should have avoided "set[ing] up the wholly foreseeable risk that the occupants, upon being notified of the officers' presence, would seek to destroy the evidence of their crimes"); *United States v. Duchi*, 906 F.2d 1278, 1285 (8th Cir. 1990) ("The heightened danger of destruction upon discovery was, however, reasonably foreseeable . . . [and because] that danger was created by the officers' investigative strategy, it cannot justify their warrantless entry.").

A foreseeability inquiry does not protect any particular Fourth Amendment values, but it will

almost always doom an exigent circumstances search. Particularly in drug cases, it is arguably *always* foreseeable that residents of a house where drugs are present will become nervous when a police officer knocks at the door and might flush or otherwise dispose of the drugs, yet police would be powerless to react because of that foreseeability. Procuring a warrant at that point would be in vain as the evidence would be destroyed in the interim, resulting in needlessly failed enforcement of the law. Indeed, requiring the police to take such extra steps before interceding would provide criminals with an incentive to destroy evidence. This result would be particularly galling since Fourth Amendment doctrine requires police to knock and announce themselves prior to forcing entry into a dwelling. *See Wilson v. Arkansas*, 514 U.S. 927, 930 (1995) (holding that the "common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry."). It would be unreasonable to require police to announce their presence, and then forbid them from preventing the obvious destruction of evidence that follows based on the foreseeability of suspects' reactions to the announcement.

Moreover, what particular legitimate privacy expectations would a foreseeability rule protect? If the normal privacy interest in one's dwelling is not strong enough to resist a warrantless search based on "unforeseeable" destruction of evidence, that interest does not become greater simply because the destruction of evidence is "foreseeable." There is no Fourth Amendment privacy interest in destroying evidence inside one's home. *See Ker*, 374 U.S. at 39.

As the Second Circuit observed twenty years ago, "[e]xigent circumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity." *United States v. MacDonald*, 916 F.2d 766, 771 (2d Cir. 1990).

The question whether the foreseeable destruction of evidence can justify a warrantless search calls to mind the ethical debate among journalists as to whether a reporter whose very presence may have prompted an event to occur can objectively construct a report of that event. *See* SPJ News, *SPJ cautions journalists: Report the story, don't become part of it*, available at http://www.spj.org/news.asp?ref=948 ("injecting oneself into the story or creating news events for coverage is not objective reporting"). Given the nature of newsgathering and reporting, this is no doubt an important ethical question. Many reporters understandably strive not to become the story or to "alter the narrative," for that defeats the ideal of the newsgatherer as an objective, unbiased reporter whose recitations of facts can be relied upon. *Id.* Law enforcement officers, however, are not like newsgatherers. Their whole intention is to use their presence to "alter the narrative" for the good of society. They are charged with a task fundamental to maintaining social order, and they do not have the luxury of pondering the precise nature of their existential impact on events.

Nor is the Fourth Amendment a code of ethics concerned with the moral rectitude of the police. The Founders did not include it in the Bill of Rights

principally so that officers would be held accountable for their internal motivations. Yet the only reason to impose a foreseeability test would be to punish police, not to protect legitimate Fourth Amendment interests. The Fourth Amendment is concerned instead with protecting legitimate privacy interests, and the foreseeability of a suspect's reaction to police "knock and talk" has no bearing on those interests. A foreseeability inquiry is merely a proxy for the subjective motivations inquiry the Court has already rejected. *See* Part II.A, *supra*. It tells nothing about the objective reasonableness of a search, yet allows courts to punish what they perceive to be dishonest police behavior. The Fourth Amendment does not permit that.

What is more, including a foreseeability component in an exigent circumstances test compromises the tools available to the police and forces them to hesitate in potentially dangerous or criminal situations. "To disallow the exigent circumstances exception in these cases would be to tie the hands of law enforcement agents who are entrusted with the responsibility of combating grave, ongoing crimes in a manner fully consistent with the constitutional protection afforded to all citizens." *MacDonald*, 916 F.2d at 772-73. Indeed, by blaming police officers for destruction of evidence by a suspect, foreseeability tests treat police officers as accessories to illegal destruction of evidence—for no compelling reason connected to legitimate Fourth Amendment interests.

Such treatment would contravene the Court's prior deference to legitimate snap decisions by

police. In *United States v. Sharpe*, 470 U.S. 675, 686 (1985), a vehicle search case, the Court emphasized that courts should "take care to consider whether the police are acting in a swiftly developing situation, and in such cases, the court should not indulge in unrealistic second-guessing." *See also Graham v. Connor*, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). Asking whether a suspect's search-justifying destruction of evidence was a foreseeable result of an on-the-fly police decision amounts to such an indulgence. It injects the judiciary's skeptical eye exactly where the Court has said it does not belong—in the midst of addressing ongoing, active police work where any number of uncontrollable circumstances can threaten lives and public peace. It is reasonable to allow police to take control of some of these exigencies—including destruction of evidence—without worrying about their existential proximate cause.

The Court has already rejected a form of foreseeability analysis in another Fourth Amendment context. The issue in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), was whether the police develop reasonable suspicion justifying an investigatory stop when they see a man flee from them in a high crime area. The defendant argued that minorities and others residing in high crime areas might run from the police because of a fear, justified or not, of police brutality. *Id.* at 132 (Stevens, J., concurring in part and dissenting in

part). The Court held that although "there are innocent reasons for flight from police[,]" it was reasonable for the police to suspect that Wardlow was involved in criminal activity because of his unprovoked flight. *Id.* at 125. Thus, in that case, the police were held not responsible for a foreseeable—even possibly innocuous—reaction prompted by their presence. Similarly, police who merely announce their lawful presence should not be blamed for causing, and suspects who hear that announcement should not be rewarded for undertaking, destruction of evidence—which destruction is itself an illegal act (unlike Wardlow's flight).

Fourth Amendment reasonableness tests based on police bad faith or the foreseeability of others' reactions to police would tip the delicate, long-established balance for warrantless entries. The Court should accordingly reject those inquiries and focus only on whether police presence is lawful.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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